(19,411.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 311.

ALABAMA GREAT SOUTHERN RAILWAY COMPANY

vs.

H. C. THOMPSON, ADMINISTRATOR OF FLORENCE JAMES, DECEASED.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

INDEX.

	Original.	Print.
Certificate from the United States circuit court of appeals for the sixth circuit	1	1
Statement	1	1
Questions certified	2	2
Judge's certificate	3	2
Clerk's certificate	4	2

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 11, 1905.

1 United States Circuit Court of Appeals, Sixth Circuit.

ALABAMA GREAT SOUTHERN RY. CO., Plaintiff in Error,
v.
H. C. THOMPSON, Administrator, Defendant in Error. } No. 1285.

Error to the Circuit Court of the United States for the Eastern District of Tennessee.

Before Lurton, Severens, and Richards, circuit judges.

This was an action in tort brought by the administrator of Florence James for the negligent killing of the intestate by the defendant railroad company.

The suit was started in a circuit court of the State of Tennessee and a declaration was there filed.

The plaintiff was a citizen of Tennessee.

The defendants were The Alabama Great Southern Railway Company, a corporation organized under the laws of Alabama, and Wm. H. Mills and Edgar Fuller both citizens of the State of Tennessee.

The case was then removed into the court below upon petition of the railroad company alone upon the ground that a separable controversy, involving more than $2,000.00 exclusive of interest and costs, existed between the petitioner and the plaintiff as to whom diversity of citizenship existed, which could be tried out without the presence of either of the individual co-defendants of petitioner.

A motion to remand to the State court because no removable separable controversy appeared was overruled.

2 Thereupon an issue was made and the case heard by court and jury and a judgment rendered in favor of the plaintiff and against the railroad company alone.

From this judgment the railroad company sued out this writ of error.

Upon the hearing in this court, the court raised the question as to whether the court below had rightfully acquired jurisdiction by the removal proceedings referred to, the removal being grounded only upon the question of separable controversy appearing upon the face of the declaration of the plaintiff at the time of the application for removal.

That declaration substantially averred that the intestate of the plaintiff had been negligently, wrongfully and carelessly run over while upon the track of the railroad company, in the exercise of due care, by an engine and train of cars owned and operated by the railroad company, which said train was at the time under the management and control of the individual defendants Wm. H. Mills as conductor and Edgar Fuller as engineer.

Entertaining grave doubt as to whether a joint right of action was stated against the railroad company and the two individual defend-

ants who were servants of the railroad company, it is ordered that the foregoing statement be certified to the supreme court and that the instruction of that court be requested for the proper decision of the following questions which arise upon the record :

1. May a railroad corporation be jointly sued with two of its servants, one the conductor and the other the engineer of one of its trains, when it is sought to make the corporation liable only by reason of the negligent act of its said conductor and engineer in the operation of a train under their management and control and solely upon the ground of the responsibility of a principal for the act of his servant, though not personally present or directing and not charged with any concurrent act of negligence?

2. Is such a suit removable by the corporation, as a separable controversy, when the amount involved exceeds $2,000.00 ex-
3 clusive of interest and costs, and the requisite diversity of citizenship exists between the said company and the plaintiff, the citizenship of the individual defendants sued with the company as joint tort feasors being identical with that of the plaintiff?

HORACE H. LURTON,
HENRY F. SEVERENS,
JOHN K. RICHARDS,
Judges of the United States Circuit Court of Appeals for the Sixth Circuit, Sitting in said Case.

June 29, 1904.

4 United States Circuit Court of Appeals for the Sixth Circuit.

UNITED STATES OF AMERICA, Sixth Judicial Circuit, } ss:

I, Frank O. Loveland, clerk, of the United States circuit court of appeals for the sixth circuit, do hereby certify that the foregoing certificate and statement of facts in the case of The Alabama Great Southern Railway Company, plaintiff in error, *versus* H. C. Thompson, administrator, defendant in error, No. 1285, was duly filed and entered of record in my office by order of said court, and as directed by said court, the said certificate is by me forwarded to the Supreme Court of the United States for its action thereon.

In testimony whereof, I have hereunto subscribed my name, and affixed the seal of said court, at the city of Cincinnati, Ohio, this 29th day of June, A. D. 1904.

[Seal United States Circuit Court of Appeals, Sixth Circuit.]

FRANK O. LOVELAND,
Clerk United States Circuit Court of Appeals,
Cincinnati, Ohio.

Endorsed on cover: File No. 19,411. U. S. circuit court of appeals, 6th circuit. Term No. 311. Alabama Great Southern Railway Company *vs.* H. C. Thompson, administrator of Florence James, deceased. Filed July 7th, 1904. File No. 19,411.

FILE COPY.

Office Supreme Court U. S.
FILED
JUN 2 1905
JAMES H. McKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. ~~III.~~ 58.

ALABAMA GREAT SOUTHERN RAILROAD COMPANY,

vs.

H. G. THOMPSON, ADMINISTRATOR OF FLORENCE JAMES, DECEASED.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Brief for Alabama Great Southern Railroad Company in Support of the Right of Removal.

EDWARD COLSTON,
Attorney for the Alabama Great Southern Railroad Company.

JUDSON HARMON,
A. W. GOLDSMITH,
GEORGE HOADLY,
Of Counsel.

THE CLERK INDEX PRESS, Law Printers, 806 Main Street, Cincinnati, Ohio.

CLERK'S COPY.

72

1272
S. C.

CERTIFICATE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, ~~1904.~~ 1905.

No. ~~[illegible]~~ 58.

ALABAMA GREAT SOUTHERN RAILWAY COMPANY

vs.

H. C. THOMPSON, ADMINISTRATOR OF FLORENCE JAMES, DECEASED.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

FILED JULY 7, 1904.

(19,411.)

Consideration of the cases on this subject should begin with attention to the case of *C. & O. Railway Co.* v. *Dixon,* 179 U. S., p. 131. It was an action against the railway company, and the engineer and fireman operating the engine, for causing the death of the decedent at a highway crossing of the track.

Nothing decided in that case militates against our present contention, for the following reasons:

(1) This court held in that case that the allegations of the petition were consistent with concurrent negligence on the part of the railway company. (Last par., p. 139.) In the present case the questions propounded show there was no concurrent negligence of the master.

(2) Where the liability of the master is solely because of that relation, and the liability of the servant is because of his personal act in doing the wrong, the question whether a joint cause of action accrues, was not passed upon by this court. Mr. Chief Justice Fuller, after stating that some courts had decided that such liability of master and servant might be enforced in the same action, and that other courts had decided to the contrary, said:

"The determination of which (*i. e.*, the right to enforce such liability in the same action) by the highest court of Kentucky we are not called upon to revise, as the disposition of this case turns on *other considerations.*" (p. 137. Italics ours.)

(3) The action in that case was founded on a statute of Kentucky which authorizes the suit under it to be brought against "the corporation or corporations, their

agents or servants causing the same." (Ky. Stats., Carroll, 1899, Sec. 6.)

The Court of Appeals of Kentucky holds that this statute creates a joint cause of action, as we understand the decision of that tribunal. *Winston's Admr.* v. *I. C. Ry. Co.*, 23 Ky. Law Rep., at p. 1285.

But the Tennessee statute does not create the cause of action. It merely continues decedent's cause of action by abrogating the common law rule abating personal actions on the death of the injured person. *Elliott* v. *Felton* (U. S. Circuit Court of Appeals, Sixth Circuit), 119 Fed. Rep., 270.

Mr. Chief Justice Fuller, in the opinion in the Dixon case, supposed Mr. Justice Gray, then Chief Justice of Massachusetts, had remarked in *Mulchey* v. *Methodist, Religious Society,* 125 Mass., 487, that the question is "a somewhat nice one" whether, in a case like the one now under discussion, the master and servant can be joined in the same action.

It is important to note that the remark was not made by Chief Justice Gray. On the contrary, in *Mulchey* v. *Methodist Religious Society,* he said in unqualified terms that such an action could *not* be maintained. The language attributed to him was used by the writer of the opinion of the Supreme Court of Maine in *Campbell* v. *Portland Sugar Co.,* 62 Me., 552. What was there said on the subject is:

"But it does not thence follow that they are jointly responsible. The question whether they may be so held is a somewhat nice one, but there are substantial reasons

assigned in *Parsons* v. *Winchell,* 5 Cush., 592, why the principal and agent should not be charged jointly in such a case. It is not, properly speaking, their joint act or neglect which causes the injury."

Taft, J., in writing the opinion of the Court of Appeals, in *Warax* v. *The C., N. O. & T. P. Ry. Co.,* 72 Fed. R., p. 637, gave thorough consideration to the subject. He states most ably the present state of the law. He says (p. 642) that the rule which permitted a plaintiff to join several defendants in one action of tort was based originally on the theory that they were to be held as conspirators; "and that each, having knowingly embarked on the unlawful adventure, was liable for all that the other did, and that therefore they could be held as partners in wrong," and that finally joint trespassers, who were guilty of negligence operating to produce injury, were regarded as acting in concert, each to be held as liable for the entire damage, "as for a joint tort."

He then adds:

"Hence, the question is whether, when a master is held liable for the negligence of his servant in his absence, which negligence he did not direct, he can be said to have acted in concert with the servant to produce the injury in such a way as that he and the servant can be held liable in the joint action. Clearly not. His liability does not arise from any common purpose that he had with the servant, or from any actual unity of action between them, in point of time and effect, or otherwise. His liability arises simply and solely from the policy of the law, which makes him responsible for the acts of his servant, done in the discharge of his business. The rule by which he is held is usually referred to as the rule of *respondeat superior.*"

After quoting a passage from Mr. Pollock, the learned judge proceeds (p. 643):

"It will thus be seen that the master is not held on any theory that he personally interferes to cause the injury. It is simply on the ground of public policy, which requires that he shall be held responsible for the acts of those whom he employs, done in and about his business, even though such acts are directly in conflict with the orders which he has given them on the subject. The liability of the servant, on the other hand, arises wholly because of his personal act in doing the wrong. It does not grow out of the relation of master and servant, and does not exist at all, unless it would also exist for the same act when committed, not as the servant, but as the principal. *Liabilities created on two such wholly different grounds can not and ought not to be joint.*" (Italics ours.)

To show that the liability of the master for the unauthorized act of the servant is a separate liability from that of the servant, it is useful to consider that when forms of actions were in vogue the master could be made liable in such case only by action *on the case;* while the servant, as an immediate offender, was liable in trespass. This is well illustrated by the case of *Sharrod* v. *The London & Northwestern R. R. Co.,* 4 Ex. Rep., * p. 580. The action was trespass for driving a railway engine over the plaintiff's sheep, by means whereof they were killed. It appeared that the sheep had got upon the defendant's line of railway in consequence of defective fences, and were run over by an express train drawn by a locomotive engine, driven by a servant of the company, who had directions to drive at a certain rate per hour; and it was suggested that, while going at that rate, in the dusk of the

evening when the accident happened, the driver could not have seen the sheep in sufficient time to avoid the collision. The sole question was whether the company was liable in trespass. After elaborate argument it was held that the proper form of action was trespass on the case, and not trespass. The reason of the decision is founded upon the essential difference between the liability of the servant and that of the master. In the course of argument at the bar, Alderson, B., said (p. 583):

"If a master directs a servant to do a particular act, which, by the mere force of nature, can not be done without producing injury to another, and the servant does the act, the master is liable in trespass, because he directs his servant to do an act which must necessarily result in an injury."

This was said in reply to the claim of counsel that under the requirement to drive the engine at a certain rate per hour, the driver could not in the dusk of evening have seen the sheep in time to avoid collision, and that thus the company was directly instrumental in such injury.

And in further reply to this view, Parke, B., in delivering the judgment of the court, said (* p. 587):

"We should observe, that, though the master in this case is taken to have ordered the driver of the engine to proceed at a great speed, it did not follow as a *necessary* consequence that it would impinge on the plaintiff's cattle. It might not have happened, if the driver had seen the cattle sooner, or the cattle had heard the engine, and got out of the way. The act, therefore, can not be treated as a trespass, on the ground that it was, by necessary implication, ordered to be done by the defendants—the

principle on which the case of *Gregory* v. *Piper* was decided. This is the simple case of an act done by the servant in the course of his employment, not specifically ordered by the master; and though the injury by such an act be *direct* so far as relates to the servant, we have recently held that a master would not be responsible in trespass."

It is obvious that the abolition of forms of action by codes of procedure, if there be such code in Tennessee, would not affect the value of the case last cited, in its application to the present question.

In Pomeroy on Code Remedies, 4th Ed., Sec. 208, it is said:

"The common law doctrines concerning the liability of tortfeasors, and as to joinder or separation of them in actions brought to recover damages for the wrong, are entirely unchanged by the new system of procedure. It is unnecessary to repeat these ancient rules; that they are still in operation, with their full force and effect is sufficiently shown by the following particular instances;"

And after stating the instances he proceeds (Sec. 209):

"In order, however, that the general rule thus stated should apply, and a union of wrongdoers in one action should be possible, there must be some community in the wrong-doing among the parties who are to be united as co-defendants; the injury must in some sense be their joint work. It is not enough that the injured party has on certain grounds a cause of action against one, for the physical tort done to himself or his property, and has, on entirely different grounds, a cause of action against another, for the same physical tort. There must be something more than the existence of two separate causes of action for the same act or default, to enable him to join the two parties liable in the single action. This principle is of universal application."

In Bliss on Code Pleading, 3d Ed., Sec. 83, it is said:

"Persons are not jointly liable for a tort merely because they have some connection with it, even if it may give a several cause of action against them. There must be some co-operation in fact; 'there must be some community in the wrong-doing among the parties who are united as co-defendants.'"

See also 17 Am. & Eng. Encyl. of Law (1st Ed.), p. 602.

The decided weight of authority is in favor of the proposition that a joint action will not lie against the master and servant for an injury caused solely by the want of care of the servant in the course of his employment.

The principal case in this country is *Parsons* v. *Winchell*, 5 Cush., 592. It was an action against three defendants, one of whom was the servant of the other two, for an injury caused by careless driving on the part of the servant. It was held that there was no joint liability. The court said (p. 593):

"To maintain an action against two or more jointly, the plaintiff must show a joint cause of action. In an action *ex delicto*, the act complained of must be the joint act of all the defendants, either in fact, or in legal intendment and effect. In trespass, all are principals, and he who commands a trespass to be committed, though absent when it is committed, is regarded as a trespasser, and may be sued alone, or jointly with him who obeyed his command. * * * But the act of a servant is not the act of the master, even in legal intendment or effect, unless the master previously directs or subsequently adopts it. In other cases, he is liable for the acts of his servant, when liable at all, not as if the acts were done by himself, but because the law makes him answerable therefor."

The opinion contains a careful review of the authorities.

This case was followed and this doctrine re-affirmed in *Mulchey* v. *Methodist Religious Society,* 125 Mass., 487, where the opinion was delivered by Chief Justice Gray. It was an action in tort against the society, and Barber and Sleeper, a committee authorized to have its church edifice painted; and for that purpose to employ a carpenter and builder to erect and remove the staging and to supply the materials and labor. They employed one Curtis to erect and remove the staging, and also employed the plaintiff to paint the ceiling of the church. While so engaged he was injured by the fall of the staging. On the trial the court was asked to charge the jury that the party injured by the act or negligence of the agents, there being no evidence of any action of the principal other than the acts of the agents, might elect to sue either, but could not maintain an action against both jointly (p. 488).

The court refused to give this instruction, and a verdict was returned against all the defendants, and for error in refusing to give the instruction the judgment was reversed. Mr. Justice Gray said (p. 489):

"But the jury should have been instructed, as requested by the defendants, that this action, being in the nature of an action on the case, could not be sustained against both the society and its agents. If there was any negligence in the agents, Barber and Sleeper, for which they could be held liable, their principal, the society, would be responsible, *not as if the negligence had been its own,* but because the law made it answerable for the acts of its agents. Such negligence would be neither in

Supreme Court of the United States

OCTOBER TERM, 1904.

ALABAMA GREAT SOUTHERN RAILROAD COMPANY

No. 311. *vs.*

H. G. THOMPSON, Administrator of Florence James, Deceased.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Brief for Alabama Great Southern Railroad Company in Support of the Right of Removal.

STATEMENT OF CASE.

This case comes into this court on a certificate of the Judges of the United States Circuit Court of Appeals for the Sixth Circuit, asking instruction of this court for the proper decision of two questions arising upon the record of the case. These questions are:

1. May a railroad corporation be jointly sued with two of its servants, one the conductor and the other the engineer of one of its trains, when it is sought to make the corporation liable only by reason of the negligent act of its said conductor and engineer in the operation of a train under their management and control, solely upon the ground of the responsibility of a principal for the act of his servant, though not personally present or directing and not charged with any concurrent act of negligence?

2. Is such a suit removable by the corporation, as a separable controversy, when the amount involved exceeds $2,000, exclusive of interest and costs, and the requisite diversity of citizenship exists between said company and the plaintiff, the citizenship of the individual defendants sued with the company as joint tortfeasors being identical with that of plaintiff?

The certificate shows that the action was an action in tort brought in a state court of Tennessee by a citizen of that state against the Alabama Great Southern Railroad Company, a corporation under the laws of Alabama, and William H. Mills and Edgar Fuller. The individual defendants were citizens of the same state as plaintiff. They were respectively the engineer and conductor of a train of cars of the railroad company operated on its railroad. The cause of action set forth in the declaration is succinctly represented in the certificate as follows:

"That the intestate of the plaintiff had been negligently and carelessly run over while upon the track of the railroad company, in the exercise of due care, by an engine and train of cars owned and operated by the railroad company, which said train was at the time under the management and control of the individual defendants William H. Mills as conductor and Edgar Fuller as engineer."

The case was removed into the United States Circuit Court upon petition of the railroad company alone, upon the ground that the controversy was one "wholly between citizens of different states," viz.: the railroad company and the plaintiff, "and could be fully determined as between them;" and involved more than two thousand dollars, exclusive of interest and costs. (1 Sup. Rev. Stats. U. S., 2d Ed., Sec. 2, p. 612.)

A motion to remand the case to the state court was made by the plaintiff on the ground that "no removable separable controversy appeared." This motion was overruled. A trial in the United States Circuit Court resulted in a judgment for the plaintiff, and the railroad company sued out a writ of error and brought the case into the Court of Appeals. In that court the judges, entertaining grave doubt as to whether "*a joint right of action* was stated against the railroad company and the two individual defendants who were servants of the railroad company," certified a statement of foregoing facts to this court and ask its instructions on the questions already stated.

ARGUMENT.

I.

The removal of the case was made under the act of Congress passed August 13, 1888, to correct the enrollment of the act of March 3, 1887, and is found in 1 Sup. Rev. Stats. of United States (2d Ed.), p. 611. A part of Section 2 of said act is as follows:

"And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the Circuit Court of the United States for the proper district."

Of course, the ultimate question is the right to remove this case to the United States Court. The questions submitted by the judges make this right depend upon whether there is a joint cause of action against the company and its servants, where the cause of action stated is negligence of the servants in the operation of a train of cars, without any act or omission, express or implied, of the company itself.

Parties can not be guilty of a joint tort unless each has contributed to the harmful result. In the present case the company, itself, has not been an actor in that which caused the injury. Its sole responsibility is because in law it is surety for the conduct of these servants. On that account alone it is sued. Does such responsibility make it proper to join them with the company in an action? The liability of the individual defendants is because they did the thing that brought about the injury. Such liability is entirely separate from that of the company. The questions propounded state the case of a principal neither present at, nor directing nor concuring in, the act which produces the injury. The railroad company in the case certified does no act; it only suffers vicariously for the acts or omissions of others for whose conduct by social

exigency or by the rescript *respondeat superior*, it is made sponsor. It is not, however, a term of this sponsorship that the principal may, in such a case, be sued in the same action with the immediate offender. This liability of the master is enforceable only in trespass on the case, while the servant is liable in trespass *vi et armis*. Mr. Justice Holmes says the liability of the master for the acts of servants, which acts he has not authorized but has forbidden, "has been supposed in England to have been manufactured out of the whole cloth." But he traces its beginnings to the Anglo-Saxon institution of *Frithborh* or frank-pledge, whereby the master "was made the pledge of his servants to hand them over to justice or to pay the fine himself." (4 Harvard L. Rev., 355; also the Common Law, pp. 9, 15, 20.)

Mr. Pollock, in his work on Torts (6th Ed., p. 75), says that "no reason for the rule, at any rate, no satisfactory reason, is commonly given in our books." He then shows (p. 76) that the maxim "*qui facit per alium facit per se*" does not account for the rule, because that maxim is in terms applicable only to authorized acts, not to those acts that, although done by the agent or servant in the course of service, are specifically unauthorized or even forbidden. He then says that the maxim "*respondeat superior*" is a dogmatic statement, and not an explanation. But we venture to assert that it does explain; and that the explanation is that the rule is of dogmatic origin. It admits of none other.

stated in *Bennett* v. *Fifield*, 13 R. I., 139, parties can not be declared against jointly where there is no community of wrong-doing, even though the tort of one might be such that, without it, the neglect of duty charged upon the other would not have followed.

"A similar statement is made in *Sellick* v. *Hall*, 47 Conn., 260, 274, that it is not enough to make torts joint that the acts constituting them stand in juxtaposition in time and place. 'There must be a oneness of act.' The fact that the effects of several wrongful acts are produced at the same time and place can not affect the question."

And, in holding that the action was not joint, the court said (p. 34):

"A joint liability is not made out by patching together individual liabilities which may arise from different relations to the same transaction."

The case of *Campbell* v. *Portland Sugar Co.*, 62 Me., 552, is one that has been widely cited and approved by courts. It is a case where a corporation, being the owner of a wharf, was sued jointly with its agents, who had control of the wharf, for injuries sustained by a third person through negligence in failing to keep the wharf in repair. The court held that the action could not be a joint action against the owner and the agent. After reciting the facts the court said:

"The corporation is answerable for its constructive negligence, or perhaps (to speak more exactly), on the principle of *respondeat superior*, and must be held, as Lord Kenyon remarked in 1 East, 108, 'to make compensation for damages consequential from the employing of an unskillful or negligent servant.'

"The other defendants, who were general agents of the corporation, and had the care of this wharf, and who

through their senior partner had agreed with the lessees to make all needful repairs, are certainly in no better position than their principal.

"It is the actual personal negligence of the agents which constitutes the constructive negligence of the corporation. The corporation acts through and by them, and they act for the corporation, and when their acts or neglects result in injury to third parties, they are equally responsible with their principal. But it does not hence follow that they are jointly responsible. The question whether they may be so held is a somewhat nice one, and we think there are substantial reasons assigned in *Parsons* v. *Winchell*, 5 Cush., 592, why the principal and agent should not be charged jointly in such a case. It is not, properly speaking, their joint act or neglect which causes the injury."

In *Trowbridge* v. *Forepaugh*, 14 Minn., 133, the action was joint against the City of St. Paul and certain individual defendants for personal injuries sustained by the plaintiff who fell into a hole in or adjoining the street. The allegations of the plaintiff were that the city was under the duty of keeping its streets and sidewalks in repair and free from obstruction; that one of the defendants was the owner of a lot fronting on the street, and that he and the other individual defendants excavated a hole in the street across the front of the lot and left the hole open and unguarded; and that the city also left the hole unguarded, by reason whereof plaintiff was injured. It was held that the defendants could not be jointly sued. The court said (p. 137):

"The liability of the city depends upon a state of facts not affecting its co-defendants; and the converse. Neither is in fact or in law chargeable with, or liable

on account of the matter set up as a cause of action against the other. They did not jointly conduce to the injury by any acts of omission or commission. Under such circumstances we find no case holding that a joint action is maintainable; we are of the opinion that it is unauthorized by any statute or legal principle."

In *Brinkerhoff* v. *Brown,* 6 Johns. Ch. Cas., p. 154, Chancellor Kent, in holding that a number of defendants were properly joined as defendants to the bill, used this language:

"The defendants performed different parts in the same drama; but it was still one piece—one entire performance, marked by different scenes; and the question now occurs whether the several matters charged are so distinct and unconnected, as to render the joining of them in one bill a ground of demurrer."

In the "drama" which formed the basis of the present action, the railroad company took no part at all, and therefore should certainly not be sued jointly with those who were the actors in the "piece."

There are many cases decided by various Circuit Courts and Courts of Appeals of the United States, in which the question now under consideration has been elaborately and ably discussed, and in which it has been held that in cases like the present the action is not joint and that master and servant can not be sued jointly. These cases are:

Warax v. *Cincinnati, N. O. & T. P. Ry. et al,* 72 Fed. Rep., 637, U. S. Court of Appeals, Sixth Circuit; opinion by Taft, J.

Beuttel v. *Chicago, M. & St. P. Ry. Co.*, 26 Fed. Rep., 50, Circuit Court, Nor. Dis. of Iowa, Shiras, J.

Fergason v. *Chicago, M. & St. P. Ry. Co.*, 63 Fed. Rep., 177, Cir. Court, Nor. Dis. of Iowa, Shiras, J.

Hartshorn v. *Atchison, Top. & S. F. R. R.*, 77 Fed. Rep., 9, Circuit Court, Wes. D. Mo., Philips, J.

Doremus v. *Root et al*, 94 Fed. Rep., 760, Hanford, J.

Helms v. *Northern Pac. Ry. Co.*, 120 Fed. Rep., 389, Circuit Court, Dis. Minn., Amidon, J.

Davenport v. *Southern Ry.*, 124 Fed. Rep., 983; Simonton, J.

Gustafson v. *Chicago, R. I. & P. Ry. Co.*, 128 Fed. Rep., at pp. 87, 88; Philips, J.

Shaffer v. *Union Brick Co., id.*, at p. 99 *et seq.*; Pollock, J.

McIntyre v. *Southern Ry. Co.*, 131 Fed. Rep., 985; Brawley, J.

Of these cases, *Warax* v. *C., N. O. & T. P. Ry.*, *Beuttel* v. *Chicago, etc.*, *Hartshorn* v. *Railway*, *Helms* v. *Northern Pac. Ry.* and *Shaffer* v. *Union Brick Co.* are especially noteworthy by reason of thoroughness of consideration given the subject, and the able review of authorities on both sides of the question.

The decisions we have cited of the courts of England and of the courts of last resort in Massachusetts, Rhode Island, Maine, New Hampshire, Connecticut, Ohio and Minnesota and of the U. S. Court of Appeals and of Circuit Courts of the United States clearly justify us in claiming that our argument is correct, and that Question No. 1 should be answered in the negative and Question No. 2 in the affirmative.

II.

Non-Liability of the Two Individual Defendants.

The argument thus far has proceeded upon the supposition of a liability on the part of the two individual defendants. But in the case represented by the questions certified we claim no liability is shown on the part of the conductor and engineer of the train; that it is entirely consistent with Question No. 1 that the injury, the subject of the action, was unintentional; that it was caused by the mere omission of the servants to observe some precaution required by due care; that it was not caused by an act of the servants done on their own responsibility. Where the injury is caused by mere neglect or omission of the servant the master alone is liable. By the rule *respondeat superior* the act of the servant in cases of mere negligence is absorbed in the master's liability. The servant is regarded in such cases as a mere piece of machinery in his hands. In such cases, as between servant and third person, the servant really ceases to be a juridical person so long as he confines himself to the limits of his employment, and does no intentional injury. In cases of negligence by omission, the servant is suable only through the principal, and the principal may have recourse against him on the contract of employment. So entirely is the agent regarded by law as a mere instrument, that a married woman whose very being is merged in her husband, may yet be an agent for another; although she could make no contract on her own account.

Our views are sustained by the following authorities:

Lane v. *Cotton*, 12 Mod., 472, was an action on the case against Sir Robert Cotton, Postmaster General, founded on the claim that the plaintiff, being possessed of eight exchequer bills in London, inclosed them in a letter directed to a goldsmith at Worcester and delivered the letter with the bills inclosed to one Breese, an officer under the defendant, duly elected to take in, and to deliver out, letters at the post-office in London, and that the letter was taken out of the office by an unknown person and the bills lost. It was held that the Postmaster General was not liable; and when it was suggested, in reply to the claim of hardship to which this would subject the plaintiff, that Breese might be held liable, Lord Holt said, at p. 488:

"It was objected at the bar, that they have this remedy against Breese. I agree, if they could prove that he took out the bills, they might sue him for it; so they might anybody else on whom they could fix that fact; but for a neglect in him they can have no remedy against him; for they must consider him only as a servant; and then his neglect is only chargeable on his master, or principal; for a servant or deputy, *quatenus* such, can not be charged for neglect but the principal only shall be charged for it; but for a misfeasance an action will lie against a servant or deputy, but not *quatenus* a deputy or servant, but as a wrongdoer. As if a bailiff, who has a warrant from the sheriff to execute a writ, suffer his prisoner by neglect to escape, the sheriff shall be charged for it, and not the bailiff; but if the bailiff turn the prisoner loose, the action may be brought against the bailiff himself, for then he is a kind of wrongdoer, or rescuer; and it will lie against any other that will rescue in like manner; and for this diversity, *vide* I. Leon., 146; 3 Cro., 175, 143; 41 Ed.,

3, 12; I. Ro., 78, which is not well reported, but the inference may be well made from it."

It would seem from the citations made by Lord Holt that he is stating what has been the law from a very remote period.

Dr. Wharton in his work on Agency and Agents, in Section 536, discusses this subject with great ability. At p. 350 he says:

"If the servant's negligence is only one of those instinctive aberrations common to the labor of one man when absolutely under another's control, then the master is the sole person responsible for such aberrations, and the servant is irresponsible civilly, unless to the master himself. Not inconsistent with this view is the argument often cited from Lord Holt."

He then refers to the passage above quoted from Lord Holt and proceeds:

"For negligences, Lord Holt tells us, the servant is not liable; for misfeasances he is liable. If we are to understand by negligences, in Lord Holt's sense, those imperfections in the discharge of duty which are incident to the labor of all men when under the control of others, and if we are to regard as misfeasances those torts which are committed by the servant out of the line of his employment, when acting on his own responsibility, then we can reconcile the famous passage just quoted not only with the principles here advocated, but with the analogies of the law in other relations."

And further on, at p. 351, this eminent commentator says:

"In the sense with which we are now concerned we have to view labor, when stripped of all discretion or liberty as to mode of action, as a machine, throwing upon

its employer the same responsibility as a machine throws upon him who runs it, and relieving the employee from liability to anybody but his master for injuries to third persons arising from the employee's negligence. It is but proper that if I should undertake to control the action of another in a particular line, I should stand between him and third persons, so far as he confines himself to such line, and inflicts no malicious injuries. I have extinguished his relations to others, so far as concerns this line, and others, therefore, as long as he keeps within the line, can not reach him except through myself."

Cameron v. *Reynolds*, 1 Cowp., 403, was an action against an under-sheriff for damages for failure to execute a bill of sale for goods he had levied on under a *fi. fa.*, and it was held that the action would not lie against him but only against the sheriff. Lord Mansfield, in delivering the opinion of the court, said, p. 406:

"The first objection is an objection upon the face of the declaration, that this action does not lie against the under-sheriff, and therefore that judgment ought to be arrested. As to that, we are all of opinion, the action does not lie against the under-sheriff. It is an action brought against him for a breach of duty in the office of sheriff. Wherever that is the case, the action must be brought against the high sheriff, as for an act done by him; and if it proceeds from the default of the under-sheriff or bailiff, that is a matter to be settled between them and the high sheriff."

Williams v. *Cranston*, 2 Starkie, *82, was an action on the case brought against defendant as a carrier, charging him with negligence in the carriage of a watch delivered to him to be carried from London to Weybridge, in consequence of which the watch was lost. It appeared,

fact, nor in legal intendment, the joint act of the principal and of the agents; and, therefore, both could not be jointly sued. It is not like the case of a willful injury done by an agent by the command or authority of his principal, in which both are in law principal trespassers and therefore liable jointly."

In this connection the case of *Hewett* v. *Swift and others,* 3 Allen, 420, should be noticed. It was an action in trespass *vi et armis,* by reason of an assault and battery committed by the servant of the company, who had charge of the freight in the freight depot, upon a boy who was playing there and who refused to leave when requested by the servant to do so. The boy was forcibly removed by the servant, who, in doing so, kicked him and severely injured him. Swift, the president of the company, had given this servant instructions to keep boys out of the depot, and to remove them therefrom. It was in the execution of this order that the kicking was done by the servant.

The principal questions in the case were whether the corporation was liable for this act of the servant, claimed to be malicious and in excess of authority; and, if liable, whether the corporation could be joined in the action with the servant.

The court held that the company was liable in trespass, and might be sued in a joint action with the servant. This was based upon the ground that the company was a direct participant, because it had ordered the expulsion of the boy, and thereby became a party to the *manner of* his expulsion. The court, however, expressly approved

the case of *Parsons* v. *Winchell* (see top of p. 425); thereby holding, in effect, that if the circumstances had been such as to have made the company liable only *in case*, it could not have been joined in the action with the servant who committed the wrong. In stating the ground of its judgment the court said:

"To sustain the ruling in the present case, as well as that of *Moore* v. *Fitchburg Railroad*, it is only necessary to hold that where the corporation give an order to a servant to do an act which implies the use of force and personal violence to others, if the servant in the execution of that service goes beyond the proper limits as to the use of force, and commits a trespass by unjustifiable violence, and inflicts an injury by a blow or kick upon the person attempted to be removed, the corporation will be liable in an action of trespass therefor."

It will thus be seen that the court, in its holding that the action might be joint, confined itself to the particular class of cases mentioned. In discussing the objection that the action should have been an action on the case and not in trespass, the court said (p. 424):

"But the objection taken lies deeper than that of the form of action merely, and questions the right to maintain a joint action of trespass against the corporation and their servant, in such a case as the present. If the corporation is chargeable in trespass for the act here complained of, then the joinder is proper, for in trespass all the actors are principals, and he who commands the act, as well as he who commits the trespass, may be joined."

The court there placed the company in the category of one who had commanded the doing of the act which constituted trespass, and on that account alone held that

the action was properly a joint action. If the circumstances had made the company liable only *in case,* and not in trespass, the court would not have held that that was a joint cause of action.

In *Bailey* v. *Bussing,* 37 Conn., 349, the court said (p. 351):

"As we understand the law, in this state, and the practice generally, we do not well see how a joint action can be maintained against a master and his servant for the negligence of the servant alone."

This was held in a case where the suit was against a master and servant for damages sustained by a passenger in a stage-coach, belonging to the master, caused by the carelessness of the servant who was driving the vehicle.

See also *Sellick* v. *Hall,* 47 Conn., 260, where the court said (p. 274):

"It is not enough to make torts joint that the acts constituting them stand even in immediate juxtaposition, both in time and place. There must be a oneness of act. Two men with their carts may enter upon my land and each dig and carry away my soil. Yet if they are not acting in concert there are two distinct torts and not a joint one, even though they dig from the same pit and at the same time. Here there is not even a juxtaposition of the wrongful acts, the one being the maintenance of an insufficient channel by the defendant, the other the letting in of an increased volume of water and sewage from artificial drains and sewers. The fact that the effects of their several wrongful acts are produced at the same time and place can not affect the question."

Page v. *Parker,* 40 N. H., 47, was an action in damages for false representations in the sale of a soap-stone quarry. The action was against three persons. One of them was the owner of the property sold, and the others were the owner's agent who made the sale and a person who assisted him in making it. The owner gave no authority whatever to make any representations, and made none himself. His only connection with the transaction was through the agent. It was held that a joint action would not lie. The court said (p. 67):

"The ruling of the court below having apparently gone upon the assumption that David M. Parker might be holden liable as a joint conspirator with his brother and Reding, solely by reason of their alleged false and fraudulent conduct and representations, although he had neither conspired or combined with them to defraud the plaintiff, nor had in any way participated in or had any knowledge of, or given any authority for their alleged false and fraudulent conduct, representations and purpose, was therefore erroneous. The master and his servant, or the principal and his agent, can not be holden jointly liable in an action of tort for the unauthorized fraudulent acts or representations of the servant or agent, committed or made without the knowledge and concurrence of the master or principal. *Parsons* v. *Winchell,* 5 Cush., 592; *Wright* v. *Wilcox,* 19 Wend., 343; 1 Pick., 62.

"In an action *ex delicto,* the act complained of must be the joint act of all the defendants, either in fact, or in legal intendment and effect. But the act of a servant or agent is not the act of the master, or principal, even in legal intendment or effect, unless the master or principal previously directs or subsequently adopts and ratifies it. *Parsons* v. *Winchell,* 5 Cush., 593."

In *Clark* v. *Fry*, 8 Ohio St., 377, the Supreme Court of Ohio, in holding that a joint action could not be maintained against a lot owner and his servant for an excavation in front of house of the lot owner, negligently left unfenced and unguarded by the servant, whereby plaintiff sustained an injury, said:

"If, however, Freeman, acting under the control and direction of Clark, as his servant or agent, had negligently and wrongfully allowed the excavation to be in an unfenced or otherwise dangerous condition, whereby the injury was sustained, Clark would be liable, although not jointly, with Freeman. In this last instance supposed, either Clark or Freeman might be sued separately; but inasmuch as Clark, although he could not excuse himself on the ground that the nuisance had been occasioned by the negligence of Freeman, would have a right of action against Freeman for the recovery of such damages as he might be compelled to pay by reason of his negligence, he (Clark) could not be joined in the same action with Freeman. This doctrine was expressly ruled in *Parsons* v. *Winchell*, 5 Cush.. 592; and it appears to rest upon a reason which is entirely satisfactory."

In *Bennett* v. *Fifield*, 13 R. I., 139, it was held that where an obstruction, calculated to frighten horses, is left in a highway, and remain there after the town has become chargeable with notice of its presence and character, the town is liable, and the person who placed it there is also liable, but they are not liable jointly. The reason why the action is not joint is thus stated by the court (pp. 140-1):

"We are, however, very clearly of the opinion that Lovell and the town can not in any sense be regarded as joint tortfeasors. The torts which are imputed to them

respectively are distinct. The tort with which Lovell is charged, and for which he was sued, is a tort at common law. The tort with which the town is charged is the neglect of a statutory duty. It would be impossible to declare against them jointly if they were jointly sued, for there was no community of wrong-doing between them. It is true there is a relation between the torts, inasmuch as without the tort committed by Lovell, the statutory duty, which the town is accused of neglecting, would not have devolved upon it."

In *Cole* v. *Lippitt*, 22 R. I., 31, the action was trespass on the case for negligence. It was brought against an owner of a building and the architect supervising its construction, for causing the death of plaintiff's decedent by reason of the falling of a part of a tower of a house that was being constructed. The negligence charged against the owner was that of causing the erection of the house upon improper plans, which provided for a tower with an overhanging battlement without proper support, and also provided for bricks and mortar of a kind too hard to form a strong bond. The negligence charged against the architect was that of causing the erection of a house under improper plans; and the negligence against the builder was in not using proper construction and in failing to properly counter-balance and anchor the walls, and not allowing time for the mortar to set and harden. The court said (pp. 32, 33):

"These several charges of negligence are quite different in kind and relation, but the plaintiff claims that they constitute a joint liability, because the negligence of each defendant combined with others to produce the injury. This, however, is not enough to make a joint tort. As

the wall, yet if "in execution of the order it was the necessary or natural consequence of the act ordered to be done that the rubbish should go against the wall, the master is answerable in trespass. The evidence shows that that was the natural consequence."

And Littledale, J., said:

"If the servant, therefore, in carrying into execution the orders of his master uses ordinary care and an injury is done to another, the master is liable in trespass. If the injury arise from the want of ordinary care in the servant the master will only be liable in case."

And Parke, J., said:

"Stubbings says he was desiring not to let the rubbish touch the wall. But it appeared to be of a loose kind, and it was therefore probable that some of it naturally might run against the wall. Stubbings said that some of it of course would go against the wall. Now the defendant must be taken to have contemplated the probable consequence of the act which he had ordered to be done, and one of these probable consequences was, that the rubbish would touch the plaintiff's wall. If that was so, then the laying the rubbish against the wall was as much the defendant's act as if it had been done by his express command. The defendant, therefore, was the person who caused the act to be done, and for the necessary or natural consequence of his own act he is responsible as a trespasser."

This is another case where the act resulted, in contemplation of law, from the direct command of the employer. It is interesting to note the distinction in that respect between it and the case of *Sharrod* v. *London & Northwestern R. R. Co.*, 4 Ex. Rep., *p. 580 (*supra*). *Gregory* v. *Piper* supports our contention, because it recognizes

that the liability of the master for mere negligence of the servant rests on an entirely different principle from that upon which he is held liable where he directly participates in the wrongful act.

Moreton v. *Hardern,* 6 Dow. & R., 275, was an action on the case against three persons for injury to the plaintiff by negligent driving, whereby the plaintiff's cart was damaged. It was held that the action would lie against all three of the defendants. But it appears that the defendant who was driving and whose negligence caused the injury, and the other two defendants, were proprietors of the coach and horses, so that there was no question of master and servant involved in the case. They were all principals.

Steel v. *Lester and Lilee,* 3 C. P. Div., 121, was an action for damages for injuring plaintiff's wharf by a sloop breaking loose from her moorings under circumstances showing negligence on the part of the defendant Lilee in the management of the vessel. An action was brought in the county court against Lilee, the master of the vessel, and against Lester, the owner, and a judgment recovered. On appeal to the common pleas division the only question was whether under the circumstances of the case the owner, who alone took the appeal, was liable for the act of the master of the vessel. The master of the vessel was operating it in trade under an arrangement whereby he was to pay all expenses and divide the net profits with the owner. It was claimed on behalf of the owner that the arrangement amounted to

a hiring of the vessel to the master with absolute control, and for whose acts, therefore, the owner was not liable. The appeal was heard before only two of the judges. Lindley, J., thought that the true relation between the master and the owner was that of partners, and that on that ground the owner was liable.

But supposing that the relation between the two had been that of master and servant; no point was raised in the case as to the right to join the two in the same action, *and therefore the question we are considering was not discussed or passed upon.*

In *Wright* v. *Wilcox,* 19 Wend., *343, Cowen, J., made a statement, not necessary to the decision of the case, but which nevertheless has been the source of much subsequent error. The suit was an action on the case for injury sustained by a boy in being run over by a wagon driven by one of the defendants who was the son of the other defendant. The boy asked the driver of the wagon for permission to ride, which was given; but, while the boy was attempting to get upon the wagon the driver suddenly whipped up the horses into a trot throwing down the boy, so that the wheels passed over him. The verdict and judgment were entered against both defendants, father and son; but the court set aside the judgment against the father on the ground that he was not liable at all for the act of his son, because it was willful and malicious, and hence unauthorized.

Inasmuch as the father, who was claimed to be a principal, was held to be not liable at all, it became of

no consequence whether he was properly joined in the action with the son who caused the injury or not. Therefore we think that the following statement by Cowen, J., is obiter, viz.:

"In a case of strict negligence by a servant while employed in the service of his master, I see no reason why an action will not lie against both jointly. They are both guilty of the same negligence at the same time, and under the same circumstances; the servant in fact, and the master constructively, by the servant, his agent."

Another defect in the statement, apart from its being obiter, we submit, is that the master is not guilty of negligence at all in the case supposed. The only negligent person is the servant. The master is not negligent; but only responsible by fate of law because another is negligent. See *Helms* v. *Northern Pacific Railway Co.,* 120 Fed. Rep., at p. 392, for a criticism of this statement of Cowen, J., and for a review of the most of the other cases alleged to be contrary to our contention. *Wright* v. *Wilcox* is also repudiated in *Parsons* v. *Winchell,* 5 Cushing, at p. 594, and in *Warax* v. *C., N. O. & T. P. Ry. Co.,* 72 Fed. Rep., at p. 646.

Suydam v. *Moore et al,* 8 Barb., 358, was an action against the engineer and fireman of a locomotive for running over plaintiff's cow on the track at a place where it was not fenced. The case turned upon the statute of New York, which made the company and its employes liable for killing stock where the company had not built fences and cattle-guards. The company was not party to the case, and therefore whatever was said by the court in

regard to liability of the master was unnecessary, as no question of that sort was involved.

Montfort v. *Hughes et al,* 3 E. D. Smith, 591 (New York Court of Common Pleas), was an action for damages against the servants and their employers, caused by the servants driving horses, belonging to the employers, over the plaintiff. The case was begun in the Marine Court. Defendants did not appear on the first day of the trial, and one witness was then examined and the case continued to the next day; on that day defendants appeared and pleaded to the merits; and on motion, Wild, the servant, was struck from the record as a party, and was used as a witness, on the theory that the servant and master were improperly joined. On appeal to the Common Pleas Court, it was held that the motion to strike Wild from the record was too late (p. 593), and was therefore erroneous.

This was enough to dispose of the case; but nevertheless the court went on to say that there was no misjoinder, referring to and following the statement of Cowen, J., in *Wright* v. *Wilcox.*

Phelps v. *Wait,* 30 N. Y., 78, was an action against master and servant for injury caused by the servant in driving the master's wagon. Justice Hogeboom, citing Cowen, J., in *Wright* v. *Wilcox,* said:

"I have been unable, after a somewhat diligent examination, to find any reported case holding a contrary doctrine." (See p. 79.)

The judge made no allusion to the decisions in England, Massachusetts, New Hampshire and Ohio, which we have cited. All of them were decided prior to that time (1864); and his statement that he could find no case to the contrary is indeed surprising.

Newman v. *Fowler*, 37 N. J. Law, 89, was an action of damages against an architect for want of care in supervising the erection of a building. There was no question as to liability of master and servant involved in the case.

Wright v. *Compton*, 53 Ind., 337, was an action of damages against the owner of a stone quarry and his employes, for injuries done to the plaintiff by stones cast upon him by blasting in a quarry while he was passing in the highway. The court held it was not a question of negligence in blasting, but that the liability rested upon the fact that blasting could not be done in that quarry without endangering travelers on the highway. (See p. 341.) The case, therefore, came within the principle laid down in *Michael* v. *Alestree*, 2 Lev., 172, and *Gregory* v. *Piper*, 9 Barn. & C., 591 (*supra*).

Hoye v. *Raymond*, 25 Kan., 665, was an action by the owner of property against a constable, his deputy, and the sureties on the constable's official bond to recover damages for a sale of property of one man under an execution against another. The only question involved was whether the cause of action against the deputy constable for his tort could be united with a cause of action against the constable and the sureties on his bond. It was held this could not be done. The court said:

"To render two causes of action identical, they must be founded upon the same breach of the *same* obligation." (p. 667.)

This case is favorable to our contention.

Wilkins v. *Ferrell,* 10 Tex. Civ. App. Rep., 231, was an action against a dentist for damages for fracturing plaintiff's jaw in extracting a tooth. The tooth was drawn by an assistant or employe. There was no question of joint action against master and servant in the case, but exception was taken to the petition on the ground of *non-joinder,* because the assistant who did the work was not made defendant. In that connection the court said that both might have been joined, but it was not necessary to unite both. (See p. 235.)

The statement that both might have been joined is correct when applied to the facts of that case, because the person who pulled the tooth was an employe of the defendant and acted under his supervision and direction. (See p. 236.)

Schaefer v. *Osterbrink,* 67 Wis., 495, was an action for damages against a father and son for careless driving on the part of the son, in which both were held liable, although the father was not present at the time of the occurrence. But there was no question made in the case as to the cause of action being joint, and the court did not pass upon that point.

The foregoing review of cases includes not only those found in the reference given by Mr. Chief Justice Fuller in *Chesa. & Ohio Ry. Co.* v. *Dixon,* 179 U. S., at p. 137,

but others. And we can safely say that in only one of them—*Phelps* v. *Wait*, 30 N. Y., 78—has it been *decided* that for an injury done by a servant, without the presence, direction or concurrence of the master, a joint cause of action accrues against both. And in the case, in which it was so decided, the court was actually ignorant of the leading authorities on the subject.

And on no rational ground can it be said there is a joint tort where the injurious act consists of the negligence of the servant in the performance of something, which would have been harmless if done properly, and there has been no connection of the principal with the act, except that of master's responsibility created by law.

We ask that Question No. 1 be answered in the negative, and Question No. 2 in the affirmative.

Respectfully submitted,

EDWARD COLSTON,

Attorney for the Alabama Great Southern Railroad Co.

JUDSON HARMON,

A. W. GOLDSMITH,

GEORGE HOADLY,

Of Counsel.

May, 1905.

however, that the defendant was the driver of the coach and not the proprietor, and thereupon the plaintiff was non-suited because the action should have been not against the driver but against the proprietor. Lord Ellenborough said (at p. 84):

"I am of opinion that the defendant was not liable in the capacity of a carrier, *and no conversion has been proved to make him liable.* I accede to the proposition, that if the defendant could be considered as having taken the watch to be carried on his own account, for a reward to be paid to him, he would be liable, although he acted in fraud of his master. If it could be shown that he had been in the habit of conveying parcels for hire, the case would certainly be altered; but being a mere servant, it can not be inferred that he took the parcel to be carried for hire and reward without further proof. The only fact is, that he was the driver of the coach; no contract has been proved; there is nothing to indicate that the defendant received the parcel otherwise than in the character of a servant."

And in 1 Blackstone's Comm., *431, the law is thus stated:

"If a servant, lastly, by his negligence does any damage to a stranger, the master shall answer for his neglect; if a smith's servant lames a horse while he is shoeing him, an action lies against the master and not against the servant."

In Wharton's Comm. on Agency and Agents, Sec. 535, it is said:

"By Anglo-American law, a servant who by negligence in the discharge of his duties injures a third person is not personally liable to such third person. The maxim *respondeat superior* prevails; the principal is liable for the injury, and the agent is then liable to the principal

for damages which the latter may have sustained; and this liability attaches even where the servant, as to the particular act complained of, modifies the principal's secret orders."

In 1 Shearman & Redfield on Negligence (5th Ed.), Sec. 243, it is said:

"No agent of a private individual or corporation is ever liable to third persons for his failure to perform an obligation of his principal and which the principal has employed him to perform, but which he has not contracted with them to perform in their favor. In other words, he is not liable to them for his mere nonfeasance. He is, consequently, not responsible to them for any negligence in the performance of duties devolving upon him purely from his agency, since he can not, *as agent*, be subject to any obligations towards third persons other than those of his principal, and these duties are not imposed upon him by law, nor has he agreed with any one, except his principal, that he will perform them. In failing to do so he wrongs no one except his prinicpal, who alone, therefore, can hold him responsible for his negligence. For the failure of the agent to perform any duty which the principal owes to a third person, the remedy of such person is only against the principal, even though the fault, as a matter of fact, is entirely with the agent."

In 20 Am. & Eng. Encyl. (2d Ed.), p. 52, the law on the subject is stated as follows:

"The servant is not, in general, liable to third persons for his own nonfeasance in the course of his employment. If he neglects to perform a duty which the master owes to third persons, the remedy is against the master and not against the servant. The servant's liability under these circumstances is solely to his master, there being no privity between him and such third persons."

See, also, Story on Agency (9th Ed.), Sec. 308, at p. 378.

In *Denny* v. *Manhattan Co.*, 2 Denio, 115, it was decided that for neglect of the agent the remedy is against the principal only.

The language of the court is:

"If third persons are injured by the neglect of a known agent, the rule is *respondeat superior*, and generally the action must be brought against the principal" (p. 118).

In *Colvin* v. *Holbrook*, 2 N. Y., at p. 129, the Court of Appeals stated the law as follows:

"The rule, it is believed, is universal, that a known agent is not responsible to third persons for acts done by him in pursuance of an authority rightfully conferred upon him. The very notion of agency proceeds upon the supposition that what a man may lawfully do by a substitute, when performed, is done by himself; and the individuality of the agent so far is merged in that of the principal. It is also settled, *if anything can be established by authority*, that an agent is not liable to third persons for an omission or neglect of duty in the matter of his agency; but that the principal alone is responsible."

In *Murray* v. *Usher*, 117 N. Y., at p. 546-7, the Court of Appeals, by Andrews, J., said:

"The general rule of *respondeat superior* charges the master with liability for the servant's negligence in the master's business, causing injury to third persons. They may, in general, treat the acts of the servant as the acts of the master. But the agent or servant is himself liable as well as the master, where the act producing the injury, although committed in the master's business, is a direct trespass by the servant upon the person or property of

another, or where he directs the tortious act. In such cases the fact that he is acting for another does not shield him from responsibility. The distinction is between misfeasance and nonfeasance. For the former the servant is, in general, liable; for the latter, not."

See also, *Van Antwerp* v. *Linton,* 35 N. Y. Supp., 318.

The question has been thoroughly discussed and the same conclusion arrived at, in:

Feltus v. *Swan,* 62 Miss., 415.
Steinhauser v. *Spraul,* 127 Mo., 541.
Delaney v. *Rochereau & Co.,* 34 La. Ann., pp. 1128, 1129.
Henshaw v. *Noble,* 7 Ohio St., 226, at p. 231.
Kelly v. *Chicago, &c., Ry. Co.,* 122 Fed. Rep., at 289, 290.
Davenport v. *Southern Railway,* 124 Fed. Rep., at 984.

One of the tests by which to determine whether parties may be sued on a joint tort is whether the same proof would make a case against each. That test fails where the master's liability depends only upon his relation of master; because, to hold the servant liable, it would be necessary only to prove the doing of the act; but in order to make the master liable it is necessary to prove, in addition, the agency of the servant and that the injurious act was within its scope.

Of course, where there is no liability on the part of the servant, as we think, is the case here, his joinder in an action with the master could not prevent a removal. There are several anomalies that arise from an attempt to hold the servant liable jointly with the master where

the injury is done by mere negligence of the servant. For example, the carrier of passengers is liable for the highest degree of care that human foresight can provide. But the engineer operating the engine drawing the train would be required to exercise only ordinary care. Suppose an action by a passenger for injury sustained by the derailment of the train: The master is liable for the *least* failure to exercise care; while the engineer would be liable only for failure to exercise ordinary care. So we would have different standards of liability in the same case. Again, a servant would be liable in exemplary damages for a willful assault committed upon a third person in the performance of his employment, while the master, if a corporation, would be liable only for compensatory damages.

Cases Explained.

Under this head we shall consider the cases that those who oppose the contention that we make under the first subdivision of our argument, generally cite. These cases when properly estimated, furnish no answer to our claim.

Michael v. *Alestree*, 2 Lev., 172, was an action on the case against the master and servant for injuries sustained by the plaintiff, for that they brought a coach and two ungovernable horses into Lincoln's-Inn-Fields, "a place where people are always going to and fro about their business," and there drove the horses to make them tractable and fit them for a coach; "and the horses, because of their ferocity and being not to be managed," ran over the plaint-

iff. The court said: "It shall be intended the master sent the servant to train the horses there." The ground of liability was not negligence in driving, but the unfitness of the place for the purpose of breaking horses that were intractable. As it was done by the master's command he was a direct contributor to the thing which caused the injury.

Gregory v. *Piper*, 9 Barn. & C., 591, was trespass against the defendant alone for depositing quantities of bricks and rubbish against the wall, gates and posts of the plaintiff. The defendant had employed one Stubbings, a laborer, to lay down this material near the plaintiff's stable yard, in order to obstruct a passway, the right to use which was in dispute between plaintiff and defendant. The defendant gave Stubbings directions not to let any of the rubbish touch the plaintiff's wall. Accordingly the rubbish was laid at a distance of a yard and a half from the wall, but "being of a loose kind, as it became dry naturally shingled down towards and ran against the wall;" and Stubbings, who was a witness for plaintiff, testified "that some of it would, of course, run against the wall." It further appeared that when an application was made by the plaintiff to defendant to remove the rubbish, the latter said he was determined not to move it. The question in the case was whether an action of trespass would, under these circumstances, lie against the master for the act of the servant, or whether the action should be *on the case*. Bayley, J., said that, although the master desired the servant to lay the rubbish so as not to touch

this court, "in passing upon the right to join the master and servant in the same action," is not hampered by "any technical question of pleading, or the technical distinction under the common law between actions on the case and those of trespass." Even if forms of action had been abolished in Tennessee it would be of no consequence in the present discussion.

In actions of tort the question whether two or more defendants can be joined in the same action depends, and always has depended, upon the nature of the transaction and their connection with the same; and no technical question of pleading or technical distinction between forms of action has entered into the subject.

In Pomeroy on Code Remedies (4th Ed.), Sec. 208, it is said:

"The common law doctrines concerning the liability of tort feasors, and as to joinder or separation of them in actions brought to recover damages for the wrong, are entirely unchanged by the new system of procedure."

But in fact forms of action have not been abolished in Tennessee. To support the statement that they have been abolished opposing counsel quote at p. 3 of their brief Sections 4437, 4438 and 4605 of Shannon's Code of Tennessee, 1896. Of these, Section 4438 is relied upon as abolishing forms of action. It reads as follows:

"All wrongs and injuries to the property and person, in which money only is demanded as damages, may be redressed by an action on the facts of the case. Penal actions may be brought in the same form."

It was originally Section 2747 of the Tennessee Code (Meigs & Cooper, '57-8), and was transferred into the Shannon Code of 1896 with above number (4438). Soon after its enactment the Supreme Court of Tennessee decided, and has since adhered to it, that the only purpose and effect of the section was to eliminate the unnecessary verbiage and profusion of expression characteristic of common law pleading.

In *Cherry* v. *Hardin*, 4 Heisk., at p. 202, the court speaking of this section, said:

"It is insisted that Section 2747 of the Code, which provides that [here the learned judge stated in substance the section] —authorized this form of action here. We do not think so. We construe that statute to mean that the profusion of expression with little substance might be omitted; that matter, without multiplicity of words, is all that is to be required in notifying an adversary of what he is to answer or defend. Certainly it could not have been intended that a naked recital of facts, without more, should be sufficient to entitle the plaintiff to introduce proof, and proceed to verdict and judgment. If so, any informal and incoherent history, without address to any court, averment of debt, or damages, or of complaint, and without conclusions, is sufficient. Already there is too great inclination to construe the Code into an abolition of pleading, and in consequence an abominally loose system is growing up, which, unless checked, will convert the law from a science into a lottery."

In that case the contention was whether the cause of action imputed a *tort*; consequently whether the maxim, *Actio personalis moritur cum persona*, applied. It was claimed that that maxim attached only to actions of *tort*, and that this statute of Tennessee having abolished actions of tort, the maxim was no longer applicable. But the court took a different view; used the language above quoted, and held that the case being in tort the action had abated.

This rule has been followed in later cases in that state, notably *Cotton Oil Co.* v. *Shamblin*, 101 Tenn., 270.

And the Supreme Court of Tennessee, in *Swain* v. *Tennessee Copper Co.*, 111 Tenn., 430, a case decided in 1903, passed upon the question as to when it is proper, in an action of tort, to unite two or more as defendants in the action. That case was an action for damages against two copper companies, operating separate plants used in reducing and converting copper ore into commercial copper, for creating a nuisance by emission of fumes and vapors from their respective premises. These vapors from the two separate plants commingled in the atmosphere and

then drifted upon the premises of the plaintiff, destroying his gardens, orchard and crops. The sole question in the case was whether the two defendants were properly united in the some action under the circumstances. The court decided that this union and blending of consequences was not sufficient to constitute a joint tort; and sustained a demurrer to the declaration on the ground of misjoinder of parties defendant. In determining the question of right to unite those two defendants the court used the common law test of unity, and made no reference whatever to the provisions of Section 2747 of old Code, now Section 4438 of the Shannon Code. On the contrary the court said:

"The questions which this court is called upon to determine in these cases are not merely of *pleading*, but also of liability, or when one tort feasor is liable for damages done by others to the same party." (see p. 436).

Counsel next say that "under the practice and laws of Tennessee, the Supreme Court of such state *recognizes* the right to jointly sue the master and servants"; and then they argue that this court should be governed by such alleged "practice and laws of Tennessee." In answer to this we say:

That there is no statute law of Tennessee and there is no practice in Tennessee that "*recognizes*" the right to unite the master and servant as joint defendants in an action to recover damages from them for an injury caused solely by the negligent act of the servant without any sort of concurring negligence on the part of the master.

It is to be noticed that opposing counsel cite no statute of Tennessee allowing such joinder. And the only basis they furnish for their assertion that there is such practice in Tennessee is a passage in the opinion in the case just mentioned of *Swain* v. *Tennessee Copper Co.*, 111 Tenn., 430, and a passage in the opinion in the similar case of *Jones* v. *Ducktown Sulphur, etc.,*

Co., 109 Tenn., 375. The passage referred to in the case of *Swain* v. *Tennessee Copper Co.* is as follows:

"Torts may also be joint on account of the relations of the parties, such as the joint liability of a husband and wife for the wife's torts, that of the master and servant for the latter's torts, and that of the principal and agent, employer and employe, partner and co-partner, for the acts of the agent, employe, and co-partner, when committed within the scope of the agency, employment, or partnership." (p. 438, 2d par.)

And for this the court cites three Tennessee cases. An examination of them, however, shows that none of them was an action against master and servant, and therefore did not involve the question now under consideration. Nor did the case itself, from the opinion in which the foregoing passage is cited, involve any question as to the right to join master and servant in the same action, and therefore the passage quoted is merely *obiter*. A similar passage from the opinion in *Jones* v. *Ducktown, etc. Co.*, 109 Tenn., 375, relied on by our adversaries, is equally *obiter* and authorized.

We do not claim that there are no circumstances under which master and servant can be united in an action for damages for the negligence of the servant. Our claim is, they can not be united in the same action where the negligence is that of the servant only, in which the master has not participated in any manner whatever otherwise than as his responsibility for the act of the servant may be said to constitute participation, which, however, it can not do.

But we deny that this court, in answering the question asked by the Court of Appeals as to the right to join in the same action the master and servant under the circumstances named, will treat the proposition otherwise than as one of a general nature; there being no statute in Tennessee on the subject. The question is not, whether *in Tennessee* such joinder would be proper, but whether such joinder would be proper

generally, which is determined on the principles of the common law.

It may be that this court, *in construing words of a pleading*, would adopt a construction established by decisions of the highest court in the state. Such seems to be the tendency of *C. & O. Ry. Co.* v. *Dixon*, 179 U. S., 131, and *Connell* v. *Utica, etc. R. R. Co.*, 13 Fed. Rep., 241. But in this case there is no construction of a pleading involved. The pleading has been construed by the Court of Appeals in framing the question. And that court has, for that purpose, construed the declaration in this case as negativing concurrent negligence on the part of the railroad company.

Our adversaries further claim that under the declaration in this case it would be competent to claim that the acts of those operating the train constituted a violation of a statute of Tennessee (Shannon's Code, Sec. 1574, sub-section 4) requiring every railroad company to keep the engineer, fireman, or some other person upon the locomotive always upon the lookout ahead, and when any person, animal or other obstruction appears upon the road the alarm whistle shall be sounded and brakes put down and every possible means used to stop the train and prevent an accident, and that for such violation the company became liable under Sections 1575 and 1576 of said Code, which provides that every railroad company that fails to observe these precautions, or cause them to be observed by its agents and servants, shall be responsible for all damages to person or property occasioned by or resulting from any accident or collision that may occur. Counsel then argue that the railroad company thus came under a statutory liability; and they seek to establish the conclusion that such liability constituted negligence on the part of the company, concurrent with the negligence of the servants who, by personal commission, violated the statute. But the answer to this claim of counsel is: (1) The Supreme Court of Tennessee, in *E. T. V. & G. R. R. Co.* v. *Pratt*, 85 Tenn., 14, holds that

this statute is merely declaratory of the common law; and denies that it gives rise to a distinction such as that of a statutory liability and a common law liability. The court there holds that the statute merely specifies the particular acts necessary to be observed in order to fulfill the common law requirement to observe ordinary care. (2) The question itself expressly states that there was no concurrent negligence. This precludes consideration of the question that our adversaries seek to raise on this statute.

But our adversaries, relying on the opinion of Baker, J., in *Charman* v. *Lake Erie & W. Ry. Co.*, 105 Fed. Rep., 449, again bring forward at pp. 13 and 14 of their brief this argument about statutory liability of the corporation. But, as we have said, it is entirely inapplicable, and is aside from the question in this case. But if it were not, the views expressed by Judge Baker are successfully attacked in the opinion of Amidon, J., in *Helm* v. *N. P. Ry. Co.*, 120 Fed. Rep., at pp. 395-6, who says of it:

"The reasoning in *Charman* v. *Railroad Co.*, 105 Fed., 449, is not satisfactory. The court begins with the statement that because the master is liable he must be negligent, thus excluding the possibility that he might be liable because of the negligence of his servant. To satisfy this assumed negligence, a 'duty' is built up which no court ever considered in fixing a master's liability, and which does not fit into the facts of the case or the language of the statute."

II.

Under this subdivision of their brief our adversaries concede there is a conflict in the authorities "as to right of joinder under the facts certified in this case," but express the belief that both "in numbers and in reasoning" they "largely predominate in favor of the right of joinder." We have covered this in our original brief. We have there discussed the authorities that sustain our contention. The cases we rely on were decided by eminent judges, who displayed both research and ability in the

opinions they delivered on the question now under discussion. And we showed that the cases holding the contrary are chiefly traceable to a mere *obiter dictum* by Cowen, J., in *Wright* v. *Wilcox*, 19 Wend., *p. 343. That *dictum* has been followed without examination of the authorities; so much so that the judge writing the opinion in *Phelps* v. *Wait*, 30 N. Y., 78, a case often cited by those who oppose our contention, supposes there is no authority to the contrary of that *dictum*, although at the very time cases in England, Massachusetts, New Hampshire, Ohio, and other states, that we have cited, had been reported.

Our adversaries also say that "most if not all of the Federal cases which hold a contrary doctrine," that is to say, a doctrine contrary to their contention "seem to be bottomed on the decision of Taft, J., in *Warax* v. *C., N. O. & T. P. Ry. Co.*, 72 Fed., 637, and that "they have assumed without discussion or *apparent* consideration that the Warax case stated the correct theory upon which the master's liability is based."

This shows that counsel have, themselves, given but little attention to those cases. That admiration for the distinguished ability of that great public servant who wrote the opinion in *Warax* v. *C., N. O. & T. P. Ry. Co.* did not preclude other eminent United States judges, who wrote opinions in cases we cite, from making most thorough examination of the subject, is obvious from the opinions themselves.

The Federal cases, both before and since the decision in *Warax* v. *C., N. O. & T. P. Ry. Co.*, which contain most thorough discussion of the subject are cited at p. 23 of our original brief; and among the most prominent of them are *Helms* v. *N. P. Ry. Co.*, 120 Fed. Rep. 389; *Shaffer* v. *Union Brick Co.*, 128 Fed. Rep., p. 99 *et seq.*, and *Beuttel* v. *Chicago, etc., R. R. Co.*, 26 Fed., 50.

Since our original brief in this case was written, the opinion of a majority of the Court of Appeals for the Fourth Circuit, reversing the decision of Simonton, J., in *Davenport* v. *Southern*

Railway Co., 124 Fed. Rep., 983, has been published (135 Fed. Rep., 960.) The reversing opinion begins with the statement that—

"It has been for many years a gravely disputed question whether a complaint setting out a misfeasance committed by a servant in the course of his employment, not in the presence of, and not by the express command of the master, resulting in an injury to a third person, states a case of joint tort. The *overwhelming weight* of authority among the subordinate Federal courts is to the effect that it does not (citing cases). Among the state courts there is much authority for either view" (p. 962). (See also, *Sessions* v. *South. Pac.*, 134 Fed. R., at p. 315).

The reversal is then based upon the *assumption* that the opinion of this court in *Southern Railway Co.* v. *Carson*, 194 U. S., 136, made it necessary to follow a decision of the state court of South Carolina where the action originated. But we submit there is nothing of the sort in that case (*Southern Railway* v. *Carson*). There is no question of removal in that case. The only question was whether, if the state court had erred by refusing to charge the jury that it was necessary, in order to recover against the railroad company, to show that all the defendants were liable such refusal was a denial to the railroad company of a right arising under the Constitution or laws of the United States. This question did not call for any determination of this court of the right of removal, nor whether the complaint in the case stated a joint and several cause of action or a several one only; nor did it become necessary for this court to refer to what the decisions of South Carolina or any other states on that subject were, or had been. No petition for removal had been filed, and consequently there was no occasion to determine whether the cause of action was joint and several or several only.

Many of the authorities cited by our adversaries go no further than merely stating that the master and servant may be joined in the same action of tort. Such statements are of no value as

FILE COPY.

Office Supreme Court U. S.
FILED
NOV 8 1904
JAMES H. McKENNEY,
Clerk.

No. 58.

Supreme Court of the United States

OCTOBER TERM, 1905.

ALABAMA GREAT SOUTHERN RAILROAD COMPANY,

versus

H. G. THOMPSON, Administrator of Florence James, Deceased.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Reply to Brief for H. G. Thompson, Administrator.

EDWARD COLSTON,
Attorney for Alabama Great Southern Railroad Company.

JUDSON HARMON,
A. W. GOLDSMITH,
GEORGE HOADLY,
Of Counsel.

THE COURT INDEX PRESS, Law Printers, 806 Main Street, Cincinnati, Ohio.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

ALABAMA GREAT SOUTHERN RAILROAD COMPANY

No. 58. *vs.*

H. G. THOMPSON, Administrator of Florence James, Deceased.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Reply to Brief for H. G. Thompson, Administrator.

We have been furnished with a brief in this case for H. G. Thompson in opposition to the right to remove. In it counsel claim that forms of action have been abolished in Tennessee, and that all civil injuries, arising either out of contract or tort, are redressed by an action on the facts of the case (Shannon's Code of Tenn. [1896], Sec. 4438). Counsel therefore say that

FILE COPY.

Office Supreme Court U. S.
FILED
NOV 8 1904
JAMES H. McKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES.

~~OCTOBER TERM, 1904.~~

~~No. 311.~~

OCTOBER TERM, 1905.

No. 58.

ALABAMA GREAT SOUTHERN RAILROAD COMPANY,

vs.

H. G. THOMPSON, ADMINISTRATOR OF FLORENCE JAMES, DECEASED.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Brief for Alabama Great Southern Railroad Company in Support of the Right of Removal.

Supreme Court of the United States.

October Term 1904, No. 311.
October Term 1905, No. 58.

ALABAMA GREAT SOUTHERN RAILROAD COMPANY, - - - *Plaintiff in Error*,

v.

H. G. THOMPSON, Administrator of FLORENCE JAMES, Deceased, - - *Defendant in Error.*

Brief for Plaintiff in Error in Support of the Right of Removal.

My colleague, Mr. Edward Colston, has left nothing of val[illegible] to be said on the abstract proposition certified by the Court of Appeals, and discussed in his brief.

Mr. Colston's argument, however, doubtless for the reason that the question certified does not imperatively demand it, does not touch a practical question which, if not necessarily involved in this case, is almost invariably involved when the questions certified arise, *viz.*, if the question of removal now under discussion be controlled by *State practice* on the subject of joinder of defendants, or by *State Statute* on that subject. In some States, *e. g.*, in Kentucky, the highest State Court holds

that a servant whose negligence is charged may be joined with the innocent master, and holds that such result sometimes does and sometimes does not arise from Statute. To a complete determination, therefore, of this important question it seems necessary to decide, should the question certified by the Court of Appeals be answered in favor of removal, whether or not the result would be the reverse if the State practice so decreed.

It is sometimes insisted that the question of joinder of defendants is a question of State practice, and that the Federal courts are controlled by State Statute, or decision. To support this theory the *obiter* intimations of this court in *Chesapeake & Ohio Ry. Co. v Dixon, 179 U. S. 131, 45 L. Ed. 121,* are generally invoked.

A question of greater gravity can hardly arise, for the law reports of cases in courts, and the statute books of the States teem with devices and inventions of litigants and legislatures to impair Federal jurisdiction; and it is of the utmost importance that no doctrine be announced which would recognize the right of the State Legislature to control the jurisdiction of the Federal Courts.

Our contention here submitted is that the construction of *Section 2 of the Act of March 3, 1887,* reaffirmed *August 13, 1888,* presents a *Federal,* and not a *State* question. That, accordingly, the judgment of *Federal*

Courts, and not of *State Courts* must be the criterion. This Act of Congress confers a right of removal in certain specified cases, and the State Legislatures have no power to alter, amend, or forsooth to abolish this Federal right, directly, or by indirection. They have no right to add to, nor subtract from the rights of any litigant under this statute. This Act of Congress is complete in itself; it provides for removal in a certain situation, *to wit*, when in a suit there be *a controversy wholly between citizens of different States which can be fully determined as between them alone.* This statute confers the right of removal, and was passed for that express purpose, upon a non-resident citizen finding himself involved in a controversy with a citizen of the State of the forum when the controversy is one determinable between them alone. This provision takes no account of *who may be parties to the action or suit in which the controversy be found*, nor of *what may be the rules of practice, whether common law or statutory, of the State in which the action or suit may be pending*. Indeed, the statute seems to defy State procedure, for the hypothesis upon which it is based is that there may be a separable controversy in a suit properly brought, and rightly pending in the State Court. If properly brought there all the parties to the suit are properly joined in the suit, and this controversy is properly joined with any other controversies therein, never-

theless, the whole case is removable to the Federal Court, *regardless of the State practice permitting the joinder of all the parties litigant, and of all the controversies involved.* Indeed, in the *Removal Cases, 100 U. S. 457, 468; 25 L. Ed. 593, 598, and Blake v. McKim, 103 U. S. 336, Book 26, p. 563-4,* this court held that in a controversy between citizens of different States, either party might remove the case—

> "without regard to the position they occupy in the pleadings as plaintiffs or defendants. For the purpose of a removal, the matter in dispute may be ascertained, and the parties to the suit arranged on opposite sides of that dispute. If, in such arrangement, it appears that those on one side are all citizens of different States from those on the other, the suit may be removed. Under the old law the pleadings only were looked at, and the rights of the parties in respect to a removal were determined solely according to the position they occupied as plaintiffs or defendants in the suit. *Coal Co. v. Blatchford, 11 Wall. 174* (78 U. S., XX, 180). Under the new law the mere form of the pleadings may be put aside, and the parties placed on different sides of the matter in dispute, according to the facts." &c., &c. *p. 468.*

In *Evers v. Watson, 156 U. S. 527, 39 L. Ed. 520,* this court held that under the power to rearrange the parties, and place them on different sides of the matter in dispute according to the actual facts, it would be presumed in the absence from the record of the

petition for removal, in order to sustain Federal jurisdiction that the court did so arrange the parties, saying:

> "The power of the court under the Act of 1875, thus to rearrange the parties, and to place them on different sides of the matter in dispute according to the actual facts, has been recognized by this court in several cases. *The Removal Cases, 100 U. S. 457 (25:593); Pacific R. Co. of Mo. v. Ketchum, 101 U. S. 289 (25:932); Harter v. Kernochan, 103 U. S. 562 (26:411).* If such were the case here, the suit would then stand as one, wherein two citizens of the same State were plaintiffs, and aliens were defendants, which would be removable, irrespective of the question, whether, under the second clause of the section, a separate controversy between citizens and aliens could be removed &c."

In *Barney v. Latham, 103 U. S. 205, 26 L. Ed. 514,* this court held that when a removal of a separable controversy was effected the entire suit was removed to the Federal Court and that the right of removal was not affected by the fact that a defendant, a citizen of the same State as plaintiff, might be a proper but not an indispensable party to the separable controversy between citizens of different States. Considering the condition of the pleadings the court there said, *p. 216:*

> "The State Court ought not to disregard the petition, upon the ground that, in its opinion, the plaintiffs, against whom a removal is sought, had united causes of action which should or might have been asserted in separate suits. Those are matters more properly for the deter-

mination of the trial court, that is, the Federal Court, after the cause is there docketed."

These decisions proceed upon the idea that a controversy between two persons, citizens of different States, may exist in any suit and be separable from the rest of the suit and determinable between those two persons of diverse citizenship, and in so determining, no account whatever is taken of whether in the State Court such controversy would be regarded as separable from the rest of the suit, or as determinable between the petitioner for removal and his adversary in the controversy alone. Indeed, the practice in the State Court might be settled by judicial decision or by statute, and require all persons in anywise interested to be made parties to the suit, and, nevertheless, under the decisions just cited, the right of removal would certainly exist, if only there were in the suit the separable controversy determinable between the petitioner and his adversary alone, citizens of different States. There is no intimation that such controversy must be separable according to any rule of practice in the State Court, nor that the question whether or not it might be determined without the presence of other persons must be decided according to State practice, *e contra*, the conclusion from the decisions just noted is that the controversy may be separable and its determinability between the parties only exist regardless

of what the State Court might require as to joinder of different persons, although, possibly, it might have been otherwise "under the old law" (*"11 Wall. 174"*). The statute is meant to operate in all the States, and nevertheless the practice in any of those States may differ from that in any other State. There is no intimation in the statute that the separableness of the controversy, or its determinability between the citizens is to be determined by the practice, or the statutes of any State.

Conformably with the view we present, it is uniformly held that Federal jurisdiction can not be abridged or modified by any State statute.

In *Hyde v. Stone, 20 Howard, 173; 15 L. Ed. 874* this court said:

> "But this court has repeatedly decided that the jurisdiction of the courts of the United States over controversies between citizens of different States can not be impaired by the laws of the States which prescribe the modes of redress in their courts, or which regulate the distribution of their judicial power."

In *Smyth v. Ames, 169 U. S. 466; 42 L. Ed. 819,* plaintiffs sued on behalf of themselves and all others similarly situated as stockholders, to prevent their corporation enforcing illegal rates causing loss to the company. This court, considering the application of the 94th Rule, said that it was contended that plaintiff's remedy at law was adequate and the Federal Chancellor

authority in this discussion because they admit of the presence of concurrent negligence on the part of the master as a reason for joining him with the servant; while in the present case that ground is expressly excluded. Many of those cases also contain nothing more in the way of argument than the bare statement that there is such identification between master and servant that they may be joined in the same action of tort. This statement as to there being identification is convenient, but it is certainly not accurate; it is merely a mode of stating that the master is liable; the question remains whether there be negligence on the part of the master. And it begs the question to say that the negligence of the servant is the negligence of the master and is really the statement of an impossibility, unless the master participated in or has adopted or previously commanded the servant's act or omission. The master is liable in the case certified not because he is guilty of negligence but solely because he is made responsible for the negligence of another. This want of accuracy in the cases is pointed out by Amidon, J., in the case already referred to (120 Fed. Rep., 389). He says:

"For the purpose of determining the liability of the master for the negligence of the servant, it is common to say that the negligence of the servant is the negligence of the master. This, however, is a convenient rather than an accurate statement. The master is in fact negligent only when he participates in the wrongful act of his employe. This he can only do in one of three ways: (1) By direct participation; (2) by previous direction; (3) by subsequent adoption. In the case at bar, as is usual in suits of this character, there is no contention that the corporation was in fact a party in either of these respects to the negligence complained of. To say that because the master is responsible for the negligence of his agent he is therefore himself negligent is to confuse things that are widely different."

Helms v. *N. P. Ry. Co.*, 120 Fed. Rep., at p. 395.

Counsel seem to argue (p. 38 of their brief) that even though there be no joint liability there is not a severable controversy. They seem to argue that a several liability is not a separable

controversy, provided a resident defendant be joined; and this is so, they contend, even though there is no legal warrant for the union of such resident defendant. But we say that the right to remove can not be defeated by joining one whom the law does not permit to be joined. All courts that have considered the subject in the kind of cases we are now discussing, make joint liability the test of a separable controversy.

Nelson v. *Hennessey*, 33 Fed. R., 113, by Brewer, J.
Collins v. *Wellington*, 31 Fed. R., 244, by Shipman, J.

In *C. & O. Ry. Co.* v. *Dixon*, 179 U. S., 131, the question of right to remove was regarded as dependent upon whether there was a joint cause of action against the company and the individual defendants. This court said:

"Counsel for plaintiff in error contends, however, that plaintiff's complaint does not state a joint cause of action against the corporate and individual defendants, but states a separate cause of action against the railway company and a separate cause of action against the other defendants" (p. 135).

And as to that contention the court said:

"If the liability was not joint then separable controversies existed, and the argument is that the averment that the negligence complained of 'was the joint negligence of all the defendants', merely stated the conclusion of law that the company and its employes were jointly liable in the action for the injury inflicted through the negligence of the latter in the course of and within the scope of their employment, and this conclusion is denied on the ground that the liability of the company as alleged rested on a wholly different basis from that of the liability of its servants." (p. 136).

If the averment of liability of the company in that case had rested such liability upon the negligence of the servant alone, it is necessarily implied in the opinion of the court, although not expressly decided, that such liability of the company would be several. But this court held that the complaint did not bear such construction. On the contrary, it held that the allegation in the pleading of joint negligence could be construed to

include concurrent or personal negligence on the part of the master. And the court did so construe it (p. 139). Certainly this court would not have been astute to discover allegations of concurrent negligence of the master in that case and thus establish a joint liability, if joint liability had not been the point on which removal depended.

In *Gableman* v. *Peoria, Decatur & Evansville Ry. Co.*, 179 U. S., at p. 337, this court said it had been determined "in respect of the removal of actions of tort on the ground of separable controversy, that the existence of such controversy must appear on the face of the plaintiff's pleading, and that it does not so appear, if the defendants are charged with direct or concurrent or concerted wrong action," citing *C. & O. Ry. Co.* v. *Dixon*. This certainly amounts to a holding that if there is no charge of direct or concurrent or concerted wrongful action then a separable controversy *does appear*.

In *Powers* v. *C. & O. Ry. Co.*, 169 U. S., at p. 96, at the bottom, Justice Gray, delivering the unanimous opinion of this court, said:

> "It is well settled that an action of tort, *which might have been brought* against many persons or against any one or more of them, and which is brought in a state court against all jointly, contains no separate controversy which will authorize its removal by some of the defendants into the Circuit Court of the United States."

This clearly means that, in tort, the action is not joint merely because the plaintiff chooses to name a number of persons defendants. To have that effect it is necessary that the pleading show a *right* to make them defendants; for it speaks of actions which might have been brought against many or one. "Might have been brought," of course, means might have properly been brought. It is worth while to call attention to an error of language in a quotation in the Powers case, 169 U. S., at p. 97. The quotation is from the opinion in *Pirie* v. *Tvedt*, 115 U. S., 43. The correct quotation would be: "A defendant has no right

to say that an action shall be several, which a plaintiff *elects* to make joint," implying, of course, that the case is one in which the plaintiff has a right to elect. But in transcribing the quotation the writer of the opinion in the Powers case has inserted the word "seeks" in place of the word "elect," making it read: "A defendant has no right to say that an action shall be several which the plaintiff *seeks* to make joint;" as though the mere desire of the plaintiff to make the action joint was sufficient to make it so.

The same error appears in the opinion in C. & O. *Ry. Co.* v. *Dixon*, 179 U. S., at p. 138.

Our adversaries conclude their brief by saying (p. 45) that citizens of a state should have a right to redress grievances against corporations in state tribunals, and ought not to be put to the inconvenience and expense of taking witnesses into another jurisdiction which *may be* far removed from the place where the wrong was committed. If such language could have any weight with this court in any case it should have none in this instance because the suit was brought in the state court at Chattanooga and was removed to the United States Court sitting in the same city.

Respectfully submitted,

EDWARD COLSTON,
Attorney for Alabama Great Southern Railroad Company.

JUDSON HARMON,
A. W. GOLDSMITH,
GEORGE HOADLY,
Of Counsel.

November, 1905.

FILE COPY.

FILED
OCT 12 1905
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States

OCTOBER TERM, 1904.

No. 58.

ALABAMA GREAT SOUTHERN RAILROAD COMPANY

vs.

H. C. THOMPSON,
ADMINISTRATOR OF FLORENCE JAMES, DECEASED.

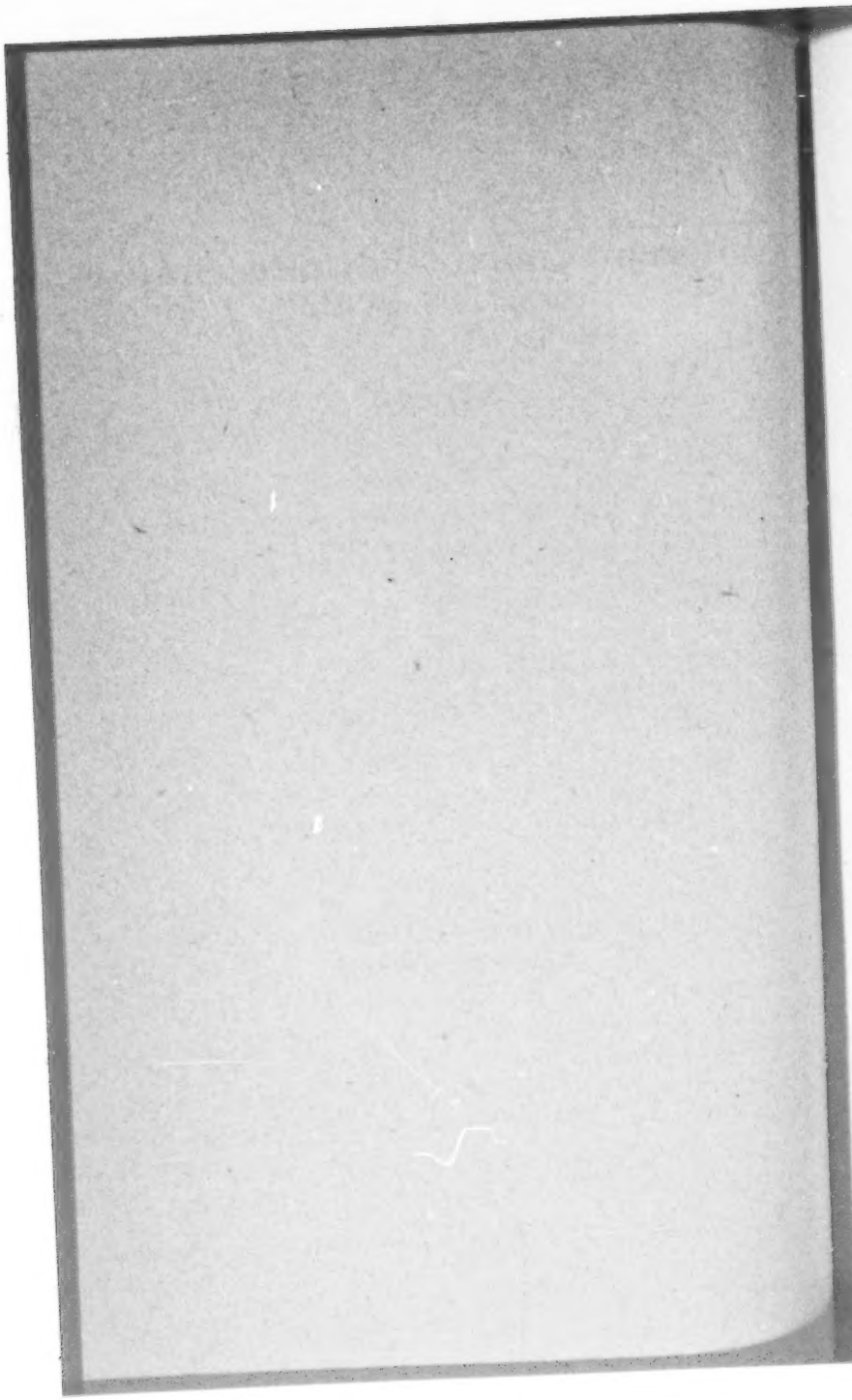
ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Reply Brief for H. C. Thompson, Administrator, in Opposition to the Right of Removal

E. S. DANIELS,
J. V. WILLIAMS,
Attorneys for Administrator.

JOHN O. BENSON,
Of Counsel.

PURSE PRINTING COMPANY CHATTANOOGA, TENNESSEE



Supreme Court of the United States

OCTOBER TERM, 1904

No. 58.

ALABAMA GREAT SOUTHERN RAILROAD COMPANY

vs.

H. C. THOMPSON,

ADMINISTRATOR OF FLORENCE JAMES, DECEASED.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

REPLY BRIEF FOR H. C. THOMPSON, ADMINISTRATOR, IN OPPOSITION TO THE RIGHT OF REMOVAL

STATEMENT OF THE CASE.

This case is in this Court on a certificate of the Judges of the United States Circuit Court of Appeals for the Sixth Circuit, which certificate, after showing that the case was originally brought in a State Court of Tennessee, against the Railroad Company, and two individuals defendants, states that "The case was then removed

without jurisdiction because the Nebraska statute authorized a railroad company to show that the rates therein prescribed were unreasonable and unjust and, if so found, to obtain an order to raise the rates, &c, and that the existence of this adequate remedy deprived the Federal Chancellor of jurisdiction, but said :

> "We can not accept this view of the equity jurisdiction of the Circuit Courts of the United States. The adequacy or inadequacy of the remedy at law for the protection of the rights of one entitled upon any ground to invoke the powers of the Federal Court is not to be conclusively determined by the statutes of the particular State in which suit may be brought, etc." *p. 516.*

We submit that the right of removal is as immune from regulation by State statute as is the right of resort to Federal equity jurisdiction.

In *Brow v. Wabash, 164 U. S. 271, 41 L. Ed. 431,* this court holding that a petition for removal did not waive irregularity in the service of process in an action for personal injury against a railroad company, quoted from *Goldey v. Morning News* that,

> "The jurisdiction of the Circuit Court of the United States depends upon the acts passed by Congress pursuant to the power conferred upon it by the Constitution of the United States, and can not be enlarged or abridged by any statute of a State. The legislature or the judiciary of a State can neither defeat the right given by a constitutional Act of Congress to remove a case from a court of the State into the Circuit Court of the United States, nor limit the effect of such removal. * * *

"Although the suit must be acutally pending in the State Court before it can be removed, its removal into the Circuit Court of the United States does not admit that it was rightfully pending in the State Court, or that the defendant could have been compelled to answer therein," etc., etc. *p.p. 276, 277.*

We contend that to hold that the question of separable controversy must be determined by the criterion of State practice is inconsistent with the spirit of the decisions just invoked and makes Federal jurisdiction the creature of State legislation, existing or not existing accordingly as the Legislature may mould the State practice with a view of preventing removal from the State Court.

There is a single instance found in the Removal Act wherein State practice is controlling, *to wit*, the enactment as to the time when the petition for removal must be filed, *viz.*, when the defendant is required by the *State law and rules of the State Court* to answer the complaint. In this instance the State may absolutely control the time when the petition for removal must be filed, but may do so not by virtue of State power but by permission of Congress expressly conferred in the Act itself. This is the only instance in which any power or authority to affect in any manner the right of removal is conferred by the statute upon any State tribunal, and the grant of the right in this instance excludes the idea that it is granted in any other particular.

The enunciation especially relied on by our opponents is :

> "*Plymouth Gold Min. Co. v. Amador & S. Canal Co. 118 U. S. 264, 30 L. Ed. 232, 6 Sup. Ct. Rep. 1034*, and *Connell v. Utica, U. & E. R. Co. 13 Fed. Rep. 241*, are more in point on the precise question sought to be raised, and in the latter case Mr. Justice Blatchford expressed the opinion that it was proper for the Federal Courts to follow the decisions of the State Courts that a cause of action was entire.
>
> Our conclusion is that it can not properly be held that it appeared on the face of this pleading, as matter of law, that the cause of action was not entire, or that a separable controversy was presented." *Ches. & O. Ry. Co. v. Dixon, 179 U. S.* 140.

It is noteworthy that this court did not there say that it was proper for the Federal Courts to follow the decisions of the State Courts that a cause of action was entire, but that Mr. Justice Blatchford had expressed that opinion in *Connell v. Utica, etc., Co.*

The decision of Mr. Justice Blatchford is not so reported as to advise us what the nature of his case was. His language in question was:

> "The decision of the State Court, at the special and general terms, that the cause of action is entire, is a decision which it is proper for this court to follow, and it leads to the conclusion that there is but a single contro-

versy in the suit, and that parties to the suit who are citizens of the same State with the plaintiff, are necessary parties to the controversy to which the plaintiff and the defendant King are parties."

In *Plymouth, etc., Co. v. Amador, etc., Co.*, the *Amador, etc., Canal Co.* sued the Plymouth, etc., Co., Alonzo Hayward, E. L. Montgomery and W. S. Hobart, the first a citizen of New York, the others of California, to enjoin them from polluting the waters running into the canal of the Amador Company, and for $25,000 damages. Upon the face of the petition it did not appear that all the parties were not jointly liable, nor that they were not acting jointly, nor was it established that there was any fraud in the joinder of all of the defendants; the decision therefore was simply that a defendant could not by answering separately make a separable controversy when it had been sued with others jointly. Whether or not if it had appeared upon the face of the petition, as it did appear in the answer, that two of the other defendants were trustees and one superintendent of the Plymouth Company, the decision would have been the same, does not appear. This court there said:

"Upon the face of the complaint there is in the suit but a single cause of action, and that is the wrongful pollution of the water of the plaintiff's canal by the united

action of all the defendants working together. Such being the case, the controversy was not separable for the purposes of a removal, even though the defendants answered separately, setting up separate defenses. *Pirie v. Tvedt, 115 U. S. 41 (Bk. 29, L. Ed. 331); Sloane v. Anderson, 117 U. S. 278 (Bk. 29, L. Ed. 891).*"

This court concluded:

"Under these circumstances the averments in the petition, that the defendants were wrongfully made to avoid a removal can be of no avail in the Circuit Court upon a motion to remand, until they are proven, and that, so far as the present record discloses, was not attempted. The affirmative of this issue was on the petitioning defendant. That corporation was the moving party, and was bound to make out its case."

The result, therefore, of the decision in *Plymouth, etc., Co. v. Amador, etc., Co.*, is that the cause of action appeared on the face of the bill to be against the defendants jointly, and that the face of the bill must control the question of joinder unless the defendant both avers and proves the fraud in the joinder. That if there be no fraud the case made by the complainant must control, and not that made by the defendant.

We have, therefore, left with which to deal, only the words of Mr. Justice Blatchford in a very meagre opinion, that a State Court decision "that the cause of action is entire, is a decision which it is proper for this (Federal) court to follow." How far reaching Justice Blatchford

would have permitted his enunciation we can not know. What argument before him there was of the point enunciated we do not know. If he be in error, presumptively this court would have pointed it out to him, had his opinion been expressed in conference here instead of upon the circuit. We submit, however, that Justice Blatchford's enunciation can not prevail. That the States can not be permitted to control Federal jurisdiction, and that the Removal Act has not made the State practice the criterion of "separable controversy" as meant in the Federal statute. That according to the decisions of this court in *Smith v. Ames, etc., supra*, even State legislation can not be permitted to control Federal jurisdiction, nor to affect or modify it.

Accordingly, when the Removal Act provides for removal of a separable controversy, it means such controversy as a just construction of that Act of Congress would decide to be separable, *i. e.*, one that could be fully determined between the parties in question, and not such controversies only as the State Courts or State Legislatures might declare separable when, perhaps, so contriving as to prevent removal to the Federal Court.

As aforesaid, this conclusion results from the Act as expounded in the cases above cited where this court held that the arrangement of litigants upon the State docket was not only immaterial, but that the Federal courts might rearrange the parties, regardless of State

practice, so as to present what was understood in the Act of Congress to be the real controversy between the parties to be determined separable or not separable within the meaning of the Removal Act.

Respectfully submitted,

EDMUND F. TRABUE,
Of Counsel.

EDWARD COLSTON,
Counsel.

into the court below upon petition of the railroad company alone upon the ground that a separable controversy, involving more than $2,000.00, exclusive of interest and costs, existed between the petitioner and the plaintiff, as to whom diversity of citizenship existed, which could be tried without the presence of either the individual co-defendants of petitioner."

The certificate further shows that the declaration was filed in the State Court before petition was filed for removal, and in referring to the averments of such declaration, says: "That declaration substantially averred that the intestate of the plaintiff had been negligently, wrongfully and carelessly run over while upon the track of the railroad company, in the exercise of due care, by an engine and train of cars owned and operated by the railroad company, which said train was at the time under the management and control of the individual defendants, William H. Mills, as conductor, and Edgar Fuller, as engineer."

It will be observed that the word "wrongfully" is contained in this statement, whereas in the quotation made by adversary counsel in their brief, this word is omitted, and which omission was evidently unintentional. But this particular word may be of much aassistance in arriving at a correct conclusion of the questions now presented for determination, and for this reason special attention is called thereto.

The statement of the case by adversary counsel, except in the above particular, is not controverted. On this state of the record, the Judges of the Circuit Court of Appeals, request instruction of this Court for the proper decision of the following questions:

"1. May a railroad corporation be jointly sued with two of its servants, one the conductor and the other the engineer of one of

its trains, when it is sought to make the corporation liable only by reason of the negligent act of its said conductor and engineer in the operation of a train under their management and control, and solely upon the ground of the responsibility of a principal for the act of his servant, though not personally present or directing and not charged with any concurrent act of negligence?

"2. Is such a suit removable by the corporation, as a separable controversy, when the amount involved exceeds $2,000.00, exclusive of interest and costs, and a requisite diversity of citizenship exists between the said company and the plaintiff, the citizenship of the individual defendants sued with the company as joint feasors being identical with that of the plaintiff?"

BRIEF.

I.

Before passing to a review and discussion of the decisions and authorities bearing upon the questions involved in this case, we deem it important to emphasize the following facts:

1. That all forms of actions have been abolished in Tennessee, and that all civil injuries, whether arising out of contract or tort, may be redressed by an action on the facts of the case.

Shannon's Code of Tenn. (1896) provides as follows:

Sec. 4437. "All contracts may be sued on in the same form of action."

Sec. 4438. "All wrongs and injuries to the property and person, in which money only is demanded as damages, may be redressed by an action on the facts of the case. Penal actions may be brought in the same form."

Sec. 4605. "Any pleading possessing the following requisites is sufficient: (1) When it conveys a reasonable certainty of meaning; (2) when, by a fair and natural construction, it shows a substantial cause of action or defense."

Thus it will be seen that when a case originates in a State Court of Tennessee, the Courts, neither State nor Federal, in passing

upon the right to join the master and servant in the same action, are hampered or embarrassed by reason of any technical question of pleading, or the technical distinction under the common law between actions on the case and those of trespass.

And we shall hereafter undertake to show that most, if not all, the State decisions, which hold that the master and servant cannot be joined in the same action under the facts certified in this case, are predicated upon the fact that the technical question of pleading, and the distinction still maintained in such states between actions on the case and those of trespass, will not permit of such joinder, while in Tennessee, no such technical questions can arise.

2. That under the practice, and laws of Tennessee, the Supreme Court of such State recognizes the right to jointly sue the master and servants under like circumstances as those existing in this case, and this being true that the Federal Courts in most, if not all, the cases in which the question of the State law and practice were involved, have unreservedly held that they will follow the practice and adjudications of the State Court on such questions.

In Connell v. Utica, etc., Railroad Co., 13 Fed Rep. 241, Mr. Justice Blatchford, in passing upon this question, said: "The decision of the State Court at the special and general terms that the cause of action is entire is a decision which it is proper for this Court to follow, and it leads to the conclusion that there is but a single controversy in the suit." This case is referred to by Mr. Chief Justice Fuller in the case of Railway Co. v. Dixon, 179 U. S. 131.

In Charman v. Railway Co., 105 Fed. Rep. 449, Judge Baker *held,* that it being settled in Indiana that a master and servant

may be jointly sued for an injury resulting from the servant's negligence, an action brought in a Court of that state cannot be severed for the purpose of removal, and referred to Wright v. Compton, 53 Ind. 337, in which the Supreme Court said: "That the servant is also liable for his own carelessness and negligence, and that the master and servant may be joined in the same action, are principles well settled."

The cases of Chesapeake & Ohio Ry. Co. v. Dixon, 179 U. S. 131, and Southern Ry. Co. v. Carson, 194 U. S. 136, are to the same effect, and clearly indicate, in our judgment, that the rule is well settled on this subject.

It becomes, therefore, material to inquire what the decisions are in Tennessee on this subject.

In a decision rendered in 1903, the Supreme Court of Tennessee, through Mr. Justice Shields, clearly indicated what the recognized practice is in such State. It is true that in the case referred to the master and servant were not joined in the same suit, but the direct question as to when, and under what circumstances, tort feasors might be joined in the same action was involved in the case. The suit was against two Copper Companies, and it was sought to hold both liable as joint tort feasors in the same action, and the Court took occasion to pass at length upon the whole question as to when the action might be joint, etc.

The case referred to is Swain v. Tennessee Copper Co., 111 Tenn. (3 Cates) 433. On page 436 the Court says:

"The questions which this Court is called upon to determine in these cases are not merely of pleading, but also of liability, or when one tort feasor is liable for damages done by others to the same party, for the test of joint liability is whether each of the

parties is liable for the entire injury done. If they are joint tort feasors, each one is responsible for the damages resulting from the acts of all the wrongdoers, and they may all be sued severally or jointly; but, if they are not joint tort feasors, each is liable only for the injury contributed by him, and can only be sued in a separate action therefor. These are most important questions, often far-reaching in their consequences, and deserve the most careful consideration."

And again on pages 438-439 it is said:

"When a tort is committed by two or more persons jointly, by force directly applied, or in the pursuit of a common purpose or design, or by concert, or in the advancement of a common interest, or as the result and effect of joint concurrent negligence, there is no doubt but that all the tort feasors are jointly and severally liable for all the damages done the injured party, and that these damages may be recovered in joint or several actions, although the wrongful conduct or negligence of some may have contributed less than that of others to the injury done.

"Torts may also be joint on account of the relations of the parties, such as the joint liability of a husband and wife for the wife's torts, that of the master and servant for the latter's torts, and that of the principal and agent, employer and employee, partner and copartner, for the acts of the agent, employee and copartner, when committed within the scope of the agency, employment, or partnership. (Snyder v. Witt, 99 Tenn., 619, 42 S. W., 441; Railroad v. Jones, 100 Tenn., 511, 45 S. W., 681; Electric Railway Co. v. Shelton, 89 Tenn., 425, 14 S. W., 863; 24 Am. St. Rep., 614; 1 Jaggard on Torts, section 67; Cooley on Torts, p. 133.)

"The parties in all these cases are joint tort feasors. The reason for holding them liable for all the damages inflicted by any of them is that they are all present, in person or by representation, and join in the wrongful act, or in some way knowingly aid in doing it, thereby consenting to and approving the entire wrong and injury done. The whole injury is committed by each and all of the trespassers, and it is but just and right that each of them should be held responsible for all the damages inflicted; and, the liability, being several and joint, they may be sued separately or jointly. But this is not the rule where the tort feasors act independently of each other, without community of interest or concert of action, or common design or purpose, or concurrent acts of

negligence, or where the injury is not the result of force directly applied, but the consequential effects of the wrongful conduct or negligence constituting a nuisance."

And previous to the above decision, the same Court, in Jones v. Ducktown Sulphur, Copper & Iron Co., 109 Tenn., 375, 385, 386 (1 Cates), after holding that when a demurrer is filed to a declaration in an action for damages against joint tort feasors, the question of joint liability must be determined by the case stated in the declaration, said:

"But, in so holding, the court does not desire to be understood as passing upon the merits of the legal question made in defendant's brief, viz., whether two tort feasors can be properly sued together, where their several acts complained of are separate and distinct, not done in collusion, by confederation, or as simultaneous acts of negligence or wrongdoing, *or where they do not sustain to each other any contractual relation, as master and servant, principal and agent, or the like* (italics ours), but where their separate and independent acts merely concur in a general result, as where a stream is polluted by two different persons turning sewage into it at different places, independently of each other, or where the air is polluted by the emanations intermingling in the air, and descending together upon the lands of neighboring owners. The question so stated and illustrated was attempted to be made in the brief and in the discussion at the bar by the learned counsel for defendants, but it could not be properly raised on demurrer to the declaration in either of the cases before the court, as these declarations were drawn."

These two cases clearly indicate that the Court meant to draw a distinction between cases of tort feasors generally, and those where it appears that the action is against the master and servant, the right of action being predicated upon the negligence of the servant. These cases hold, in effect, that the identity of master and servant is such that the liability of both can be enforced in the same action.

3. That under the facts alleged in the declaration in this case, plaintiffs' right of action is based not only upon the common law, but a violation of a Statute of Tennessee. At the time of the institution of this suit, the following Statute of Tennessee was in full force and effect:

"In order to prevent accidents upon railroads, the following precautions shall be observed: * * * *

"Every railroad company shall keep the engineer, fireman, or some other person upon the locomotive, always upon the lookout ahead; and when any person, animal, or other obstruction appears upon the road, the alarm whistle shall be sounded, and the brakes put down, and every possible means employed to stop the train and prevent an accident."

Shannon's Code, Sec. 1574, Sub-sec. 4.

And with reference to this section, it is further provided by Sections 1575 and 1576 as follows:

"Every railroad company that fails to observe these precautions, or cause them to be observed by its agents and servants, shall be responsible for all damages to persons or property occasioned by, or resulting from, any accident or collision that may occur."

"No railroad company that observes, or causes to be observed, these precautions shall be responsible for any damage done to person or property on its road. The proof that it observed said precautions shall be upon the company."

As shown by the certificate in this case, the declaration charged "that the intestate of the plaintiff had been negligently, wrongfully and carelessly run over while upon the track of the railroad company, in the exercise of due care, by an engine and train of cars, owned and operated by the railroad company, which said train was at the time under the management and control of the individual defendants, William H. Mills as conductor and Edgar Fuller as engineer." And this allegation is sufficient under the holdings of the Supreme Court of Tennessee to charge a violation of the foregoing statutory provision.

In the declaration in the case of the East Tennessee, Virginia & Georgia Railroad Co. v. Pratt, 85 Tenn. 9, no reference was made to the statute, and it was claimed by the railroad that a violation thereof could not be shown or relied upon in the case, and the Court in passing upon the question said:

"It follows, therefore, that if an injury to a person occurs while he is on the road of the company, through any negligence, of its officers and servants, it is now statutory negligence, or negligence against which the statute, as well as the common law, provides; and a declaration, as in the present case, that the servants of the company wrongfully and negligently run its train over such person, gives notice that it was contrary to the statute, and imposes no hardship on defendant in requiring that it come and defend, by showing, in accordance with the same statute, that it observed these precautions, and is therefore not liable."

As before shown, the declaration in the present case alleges that "the intestate of the plaintiff had been *negligently, wrongfully and carelessly* run over upon the track of the Railroad Company, etc.," and consequently charges a violation of the statute, although no reference whatever is made thereto in the declaration. We are advised the United States Circuit Court of Appeals of the Sixth Circuit has recently held that it will follow the State Supreme Court on the question as to the scope and effect to be given to a declaration involving the above state statute, but we are unable at this time to put our hands on this decision.

The question of the right of the railroad company to run its cars and trains in any other manner except with engine in front with the *"engineer, fireman, or some other person upon the locomotive, always upon the lookout ahead,"* as provided by statute, has frequently been before the Supreme Court of the State, and in discussing this question, Mr. Chief Justice Snodgrass, in Railway Company v. Wilson, 6 Pick., 277, 278, says:

"It may be argued that this is inconvenient; that a railroad company must some time back in trains on its tracks. This may be entirely true, but it proves nothing. The company can do all its running that way if it prefers; the statute does not prohibit it absolutely and at all events. The statute merely makes it liable for any injury inflicted while doing so. If for reasons of convenience or economy the company prefers to take the risk, it may do so; but it cannot complain that it suffers the legal consequences of the risk thus taken. Of course it can reduce the risk to a minimum by keeping some one in front of the train and warning off or actually removing obstructions. If it prevents injury, it prevents loss; but this it must do if it avoids the consequences of disregarding the statute. Nothing else will answer."

And in Railroad v. Dies, 14 Pick. 661, the court, through Mr. Justice Wilkes, says:

"We can add nothing to the force, and certainly cannot make plainer, the principle laid down in the Wilson case, that a railroad company may run its engines, tenders and trains backward if it prefers, or sees proper to do so from convenience, necessity, or other reasons, but it will always follow that the statute will make it liable for any and every injury inflicted while doing so. If any injury occurs, then liability follows inevitably, and the only question to be considered is the amount of the injury and the extent, if any, of the contributory negligence of the injured person."

Our object in calling the Court's attention to this question is twofold: (1) To show that the right of joinder may exist when the injury complained of is the result of the violation of a state statute, although such right of joinder would not exist independently of such statute.

In Charman v. Lake Erie & W. R. Co. et al, 105 Fed Rep. 449, the effect and proper construction of the following Indiana Statute was involved: "That every railroad * * * operating in this state shall be liable for damages for personal injuries suffered by any employee while in its service, the employee so injured being in the

exercise of due care and diligence, * * * where such injury was causd by the negligence of any person in the service of such corporation who has charge of any signal, telegraph office, switch yard, shop, round house, locomotive engine, or train upon a railway."

And Judge Baker in deciding the case held that where the negligence of the foreman in charge of a switch yard causes an injury to an employe therein, his act constitutes a breach of duty of the master, and at the same time, a branch of duty on his own part towards his co-employe, and the person injured may maintain a joint action against the master and servant for the injury.

It may be said by counsel for railroad that the Indiana Statute simply creates a liability against the railroad as to an employe while injured in its service, etc., and that it does not cover a case where it is not shown that the relationship of master and servant existed between the railroad and the injured party, as in the case at bar.

Our reply is, that the Tennessee Statute does not limit its force and effect to employes of the railroad, but is broad enough in its scope to cover all persons upon the track of the railroad, whether they be employes, trespassers, or what not, as the Statute says that "in order to prevent accidents upon railroads," the "railroad company shall keep the engineer, fireman, or some other person upon the locomotive, always upon the lookout ahead; and when *any person, animal or other obstruction appears upon the road* (italics ours), certain things shall be done in order to prevent accident. We are aware of the rule that as to trespassers the railroad ordinarily would only be liable for a wilful or wanton injury. But this rule has no application when recovery is sought on account of an injury inflicted because of a failure to comply with the provisions of the foregoing statute.

It is held in Railroad v. Dies, 14 Pick. 661, heretofore cited, as well as in many other Tennessee cases, that if any injury occurs by reason of the failure to comply with the Statute, *"then liability follows inevitably, and the only question to be considered is the amount of the injury and the extent, if any, of the contributory negligence of the injured party."*

(2) That the servants of the railroad company, in charge of the train, at the time of the injuries complained of, were guilty of misfeasance, and that this fact gives the right to sue jointly, although such right might be questioned if such servants were merely guilty of non-feasance. Bouvier's Law Dictionary defines misfeasance to be "The performance of an act which might lawfully be done, in an improper manner, by which another person receives an injury." Rapalje & Lawrence's Law Dictionary defines the word as follows: "Misfeasance is either the doing of a wrongful act or the improper performance of a lawful act." And other authorities define it to be "The improper doing of an act which a person might lawfully do."

In this case the railroad company and its servants might lawfully run its trains, but when they undertook to run the same in such manner as to violate a state law, this was the improper doing of an act which might lawfully be done, or was the performance of a lawful act in an improper manner, and consequently such servants are guilty of misfeasance.

Under the allegations in the declaration, it could be shown that the train causing the injury was being operated with engine in the middle or rear of the train, and this would be a positive act of misfeasance on the part of the servants in charge thereof.

II.

While the authorities are in conflict as to the right of joinder under the facts certified in this case, still we believe the authorities, both in numbers and in reasoning, largely preponderate in favor of the right of joinder. Most, if not all, the Federal cases which hold a contrary doctrine, seem to be bottomed on the decision of Judge Taft in Warax v. C., N. O. & T. P. Ry Co., 72 Fed Rep. 637.

The theory of that case is that for the negligent acts of the servants, committed in the absence, and without the concurrence or express direction of the master, the liability of the master arises solely from the policy of the law which requires that he shall be held responsible for the acts of his servants, performed in and about the master's business, while the liability of the servant arises solely from his own personal wrong.

Most of the subsequent Federal cases have assumed, without discussion, or apparent consideration, that the Warax case stated the correct theory upon which the master's liability is based. This position has been assailed as unsound by able authority, as will hereinafter be shown. The liability of the master in most, if not all cases, arises because of the violation of some duty which the master owes to the injured party. Take the present case, for instance: Both under the common law and by statute in Tennessee, as hereinbefore shown, it is made the duty of every railroad company to keep the engineer, fireman, or some other person upon the locomotive, always upon the lookout ahead, and when *any person*, etc., appears upon the road, the alarm whistle shall be sounded, the brakes put down, and every possible means employed to stop

the train and prevent an accident. (See Sub-sec. 4 of Sec. 1574 and Secs. 1575 and 1576, Shannon's Code of Tennessee.) Here is a duty imposed upon the master as to *"any person"* who may appear upon the road of the master, and if the master employs servants who negligently fail to perform this legal duty, the master is liable because of a disregard or a violation of such duty.

In Charman v. Lake Erie & W. R. Co., 105 Fed. Rep. 449, Judge Baker most admirably states this rule and supports the same with such reasoning as to place its correctness beyond doubt. After quoting the following Indiana Statute: "That every railroad * * * operating in this state shall be liable for damages for personal injuries suffered by any employe while in its service, the employe so injured being in the exercise of due care and diligence, * * * where such injury was caused by the negligence of any person in the service of such corporation who has charge of any signal, telegraph office, switch yard, shop, round house, locomotive engine, or train upon a railway," Judge Baker said: "In the case of Warax v. Railway Co., supra, it was held that there were separable controversies in a joint suit for tort against master and servant, because the liability of the master for the negligence of the servant in his absence and without his knowledge or approval arises from the principle of public policy which requires that the master shall be held responsible for the acts of his servant done in and about the master's business, while the liability of the servant arises from his personal wrong.

"The foregoing cases seem to rest upon too narrow a view of the relation of master and servant, especially where the master is a corporation, and in failing to place the master's responsibility on its true basis. To affirm that public policy or a rule of law makes the master answerable for the negligence of his servant in and about the master's business is not an accurate and complete state-

ment of the principle on which the master's liability rests. If any action can be maintained against the master in such a case, it is because he owes a duty towards the injured person which has been violated. It is universally agreed that, in order to maintain an action for injury to person or property by reason of negligence or want of due care, there must be shown to be existing some obligation or duty towards the plaintiff which the defendant has disregarded or violated. This is the basis on which the cause of action must rest. There can be no actionable fault or negligence or breach of duty where there is no act or service or contract which the party is bound to perform. The statute of this state above quoted has made it the duty of the railroad company to place a person in charge of its switch yard who should be free from fault resulting in injury to a fellow servant. The master is made an absolute guarantor that the decedent should not be harmed by the negligence of the servant in charge of the switch yard. This duty was a positive and continuing one. The duty of the person in charge of the switch yard, growing out of the exigency of the social order, was so to conduct himself about his master's business as not to injure a fellow servant by his negligence or want of due care. The plaintiff's intestate is alleged to have been killed by the negligence of the person placed by the defendant company in charge of its switch yard. The negligence of the person in charge of the switch yard gave rise to a two-fold breach of duty, namely, that of the person in charge of the switch yard and that of the railroad company. The breach of the master's duty arose from its failure to keep in charge of its switch yard a person who would not by his negligence injure a fellow servant. If the master had not failed in the performance of his duty, no actionable injury could have occurred. The servant's carelessness constituted a breach of duty on the part of the master. While the master's duty was an absolute and continuing one, to keep a person in charge of its switch yard who would not injure a fellow servant by negligence, no breach of this duty could happen, except through the negligence of the person so placed in charge. The mere placing by the master of a careless person in charge of its switch yard would of itself constitute no actionable wrong, and an actionable breach of duty could only arise when a fellow servant was injured by the negligence of such person. It is thus manifest that the company's breach of duty was concurrent in point of time with

the breach of duty of the person in charge of the switch yard, and that the breach of duty on the part of each grows out of the same acts and omissions. The injury complained of arose from a concurring and co-operating breach of duty on the part of each, and it could not have occurred except as the result of such concurring and co-operating breach of duty. If the company had not employed the careless servant, and if the servant had not been careless, the injury would not have happened. The liability of the company does not grow out of the breach of the servant's duty by the servant, on the principle of *respondeat superior*. It grows out of the breach of the company's duty by the company failing to keep a person in charge of its switch yard who would not by his negligence injure a fellow servant. If the employer fails in the performance of this duty, his responsibility does not arise out of the servant's breach of the servant's duty towards the injured party, but it grows out of the employer's breach of the employer's duty towards the decedent—a duty imposed upon the employer by law. The defendants have each violated a duty owing to the decedent, imposed upon them by law. The negligent acts of the servant gave rise to a breach of duty on the part of each. It is not essential that the duty violated by each should be joint or identical, nor that the duty of each should be deduced from the same legal principles. The case of a joint action by a passenger who is injured by the collision of two trains owned and operated by different railroad corporations affords a familiar illustration. The duty of the carrier of the passenger is to exercise the highest practicable degree of care to protect him from hurt. Its liability grows out of the breach of this duty. The duty of the other company is to use ordinary and reasonable care not to collide with the train carrying the passenger. Its liability grows out of the breach of this duty. The two companies may be jointly sued for the injury of the passenger, and the cause of action is not separable and removable by one of the two defendants. Railway Co. v. Martin, 59 Kan. 437, 53 Pac. 461; Id., 178 U. S. 245, 20 Sup. Ct. 854, 44 L. Ed. 1055. Hence it is apparent that it is not necessary to the maintenance of a joint action for tort that the injury should grow out of the breach of a joint duty, nor out of the same or similar duties deducible from the same or similar principles of law. The rule would seem to be that where the same acts or omissions constitute and give rise to a breach of duty owing by each defendant to the plaintiff, and concur and co-operate in producing the injury, a joint action may be maintained."

This opinion so fully sustains the right of joinder in this case, that we have thought it imporant to quote extensively from it.

In Riser v. Southern Ry. Co., 116 Fed. Rep. 215, Judge Simonton asserts the same rule as laid down by Judge Baker. Judge Simonton said: "The conductor is the representative of the corporation. His negligence is its negligence. If he is liable, the corporation by reason of his liability is also liable. * * * When the servant of a railway company is guilty of negligence in the course of his employment, his negligence is the negligence of the railway company. It may be one act, but the liability is the liability of both. The one cannot be separated from the other."

These opinions show that the identification of the master and servant is so complete that to hold that a separate controversy existed would end in much confusion, be a source of great injustice, and result in useless litigation to those who may have a just grievance to be redressed against corporations and their servants.

Attention is called to the fact that this Court has, in no adjudicated case that we have been able to find, committed itself to the doctrine of the Warax case in any particular. On the contrary, the intimations are that the right of joinder is to be determined on a different theory altogether. It is claimed by adversary counsel that none of the decisions of this Court are in conflict with the Warax case, and refer especially to Ry. Co. v. Dixon, 179 U. S., 131. It is true that in the Dixon case a Kentucky Statute was involved, but this Court in discussing the case seemed to largely ignore the technical question of Statute, and to place its holding upon the right of joinder independent of Statute. While in that case joint and concurrent negligence was charged, still when the specific acts of negligence alleged are considered, it

must appear that such allegations do not differ materially from the allegations in this case, and the charge that the injury resulted from the joint and concurrent negligence of all the defendants was a mere conclusion of law and not the statement of a fact.

Mr. Chief Justice Fuller in the Dixon case, among other things, said:

"In respect of the removal of actions of tort on the ground of separable controversy, certain matters must be regarded as not open to dispute. In Powers v. Chesapeake & Ohio Railway Company, 169 U. S. 92, it was said:

" 'It is well settled that an action of tort, which might have been brought against many persons or against any one or more of them, and which is brought in a state court against all jointly, contains no separate controversy which will authorize its removal by some of the defendants into the Circuit Court of the United States, even if they file separate answers and set up different defenses from the other defendants, and allege that they are jointly liable with them, and that their own controversy with the plaintiff is a separate one; for, as this court has often said, 'A defendant has no right to say that an action shall be several which the plaintiff seeks to make joint. A separate defense may defeat a joint recovery, but it cannot deprive a plaintiff of his right to prosecute his suit to final decision in his own way. The cause of action is the subject-matter of the controversy, and that is, for all the purposes of the suit, whatever the plaintiff declares it to be in his pleadings.' " * * * *

"The contention of counsel is that this complaint charged neither direct nor concurrent nor concerted action on the part of all the defendants, but counted merely on the negligence of the employes.

"If the complaint should be so construed, the question would still remain whether the cause of action was not entire as the case stood, and the objection of the difference in the character of the liability matter of defense, which might force an election, or defeat the action as to one of the parties.

"The cause of action manifestly comprised every fact which plaintiff was obliged to prove in order to obtain judgment, or, conversely, every fact which defendants would have the right to traverse. And on the principle of the identification of the master

with the servant, it would seem that there is no fact which the company could traverse which its codefendants, being its employes, could not. At all events, a judgment against all could not afterwards be attacked for the first time on this ground." * * * *

In Southern Railway Co. v. Carson, 194 U. S. 136, this Court, through Mr. Chief Justice Fuller, again said:

"The right of removal depends on the act of Congress, and the company not only on the face of the pleadings did not come within the act, but it made no effort to assert the right. The rule is well settled, as stated by Mr. Justice Gray, in Powers v. Chesapeake & Ohio Railway Company, 169 U. S. 92, 'that an action or tort, which might have been brought against many persons, or against any one or more of them, and which is brought in a State Court against all jointly, contains no separate controversy which will authorize its removal by some of the defendants into the Circuit Court of the United States, even if they file separate answers and set up different defenses, from the other defendants, and allege that they are not jointly liable with them, and that their own controversy with the plaintiff is a separate one; for, as this court has often said, 'a defendant has no right to say that an action shall be several which the plaintiff seeks to make joint. A separate defense may defeat a joint recovery, but it cannot deprive the plaintiff of his right to prosecute his suit to final decision in his own way. The cause of action is the subject matter of the controversy, and that is, for all the purposes of the suit, whatever the plaintiff declares it to be in his pleadings.'

"The view thus expressed was reiterated in Chesapeake & Ohio Railway Company v. Dixon, 179 U. S., 131, where the subject was much considered and cases cited. Reference was there made to the fact that many courts have held the identification of master and servant to be so complete that the liability of both may be enforced in the same action. And such is the law in South Carolina. (Schumpert v. Southern Railway Company, 65 S. C., 332.) In that case it was held that under the State Code of Civil Procedure, in actions *exdelicto*, acts of negligence and willful tort might be comingled in one statement as causes of injury; that master and servant are jointly liable as joint tort feasors for the tort of the servant committed within the scope of his employment and while in the master's service; that the objection that if the master and servant were made jointly liable for the negligence of the latter,

the master could not call on the servant for contribution, was without merit, as the rule was, as laid down by Mr. Cooley (Torts, page 145), that: 'As between the company and its servant, the latter alone is the wrongdoer, and in calling upon him for indemnity, the company bases no claim upon its own misfeasance or default, but upon that of the servant himself.' And see Gardner v. Railway Company, 65 S. C., 34. In Rucker v. Smoke, 37 S. C., 380, and Skipper v. Clifton Manufacturing Co., 58 S. C., 143, it was decided that in actions such as this exemplary damages may be recovered."

We call special attention to two propositions announced in the Dixon and Carson cases, as follows:

1. That "the rule is well established * * * that an action of tort which might have been brought against many persons, or against any one or more of them, and which is brought in a State Court against all jointly, contains no separate controversy which will authorize its removal by some of the defendants."

2.. "That many courts have held that the identification of master and servant to be so complete that the liability of both may be enforced in the same action."

The opinion in the American Bridge Co. v. Hunt, 130 Fed. Rep. 302, the certificate in this case, and the opinion in Davenport v. Southern Ry. Co., 135 Fed Rep., 960 (overruling Davenport v. Southern Ry. Co., 124 Fed. Rep., 983, as hereinafter shown), show very conclusively, that the subordinate Federal Courts do not regard the doctrine of the Warax case as firmly established, or that same is entitled to be followed as an authority.

In the American Bridge Co. v. Hunt, 130 Fed. Rep., 302, Judge Lurton, who sat with Judge Taft in the Warax case, used this language:

"Whether there is such legal identity of master and servant, or concert between them, as to justify a joint action when the act of negligence charged is that of the servant alone, and the liability of the master is bottomed not upon any immediate fault of the master, but upon the liability of the latter for the negligent acts of the servant, may admit of much discussion. (Warax v. C., N. O. & T. P. Ry. Co. (C. C.), 72 Fed. 637; Bryce v. Southern Ry. Co. (C. C.), 122 Fed. 709; Davenport v. Southern Ry. Co. (C. C.), 124 Fed. 983; Helms v. N. P. Ry. Co. (C. C.), 120 Fed. 389; Mulchey v. Society, 125 Mass. 487; Campbell v. Sugar Co., 62 Me. 553,

16 Am. Rep. 503; Lamm, et al v. Parrot Silver & Copper Co. (C. C.), 111 Fed. 241.) It must be confessed, however, that the doctrine of the common law in reference to the joinder of master and servant in one suit based alone upon the tort of the servant as in the Warax case, and other cases cited above, is shaken by contrary intimations found in Powers v. Chesapeake, etc., Ry. Co., 169 U. S. 92, 97, 18 Sup. Ct. 264, 42 L. Ed. 672, and Chesapeake & Ohio Ry. Co. v. Dixon, 179 U. S., 131, 137, 21 Sup. Ct. 67, 41 L. Ed. 121. This question, though a nice one and not foreclosed by authoritative decisions, does not necessarily arise upon this transcript as we construe the averments of the plaintiff's petition."

STATE DECISIONS.

There are numerous State decisions to the effect that joint liability exists under the facts of this case.

In Wright v. Compton, 53 Ind., 337, the Court said:

"The general rule is, that a master is responsible for injuries to others resulting from the carelessness or negligence of his servants, while in the performance of the master's business. * * * That the servant is also liable for his own carelessness and negligence, and that the master and servant may be joined in the same action, are principles well settled."

The case of Schumper v. Southern Ry. Co., 65 S. C., 355, is strong in its presentation of the right to jointly sue, and that there is no separable controversy. In that case the Court said:

"Appellants do not dispute the proposition that the master is liable for the negligence of the servant within the scope of his employment, nor do they dispute that the servant is also liable for his own tort. The contention is that there is no joint liability unless the master directs or is present actively co-operating in the commission of the tort. There is undoubtedly some authority for this view as shown by the cases cited in appellant's brief and by reference to the citations found in 15 Enc. P. & P. 560-561, in the note in 28 L. R. A., 441-442. The leading case for such view is Parsons v. Winchell, 5 Cush. 592 (52 Am. Dec., 745),

wherein the Court held that master and servant are not jointly liable for the servant's negligence in the master's business in so driving a team as to cause an injury to another. In the view of that Court the act of the servant is not the act of the master even in legal intendment or effect unless the master previously directs or subsequently adopts it. In either case he is liable for the act of his servant when liable at all, not as if the acts were done by himself, but because the law makes him answerable therefor. The principal reason assigned for this view is that if master and servant were made jointly liable, the master cannot call on the servant for contribution in case he should satisfy the execution. But as it appears in the Note to the case cited in the 52 Am., Dec. 743, the Mass. Court in Hewitt v. Swift, 3 Allen, 425, held that a joint action in the nature of trespass would be against a corporation and its servant for personal injury inflicted by the latter in discharging duties imposed by the corporation. Parson v. Winchell was an action on the case, and Hewitt v. Swift was in trespass under common law pleadings, which made a distinction between the remedies for injuries with force and injuries without force. All such distinctions are abolished under the code. With reference to the matter of contribution which is suggested as presenting a difficulty in the way of holding master and servant jointly liable, Mr. Cooley in his work on Torts, pages 144-5, after stating the general rule as to contribution, between wrongdoers, says:. 'But there are some exceptions to the general rule which rests upon reasons at least as forcible as those which support the rule itself, they are cases where although the law holds all the parties liable as wrongdoers to the injured party, yet as between themselves some of them may not be wrongdoers at all, and their equity to require the others to respond for all the damages may be complete. There are many such cases where the wrongs are unintentional, or where the party by reason of some relation is made chargeable with the conduct of others.'

"A case in point is where a railroad company is made to pay damages for an injury caused by the carelessness of one of its servants. Here the injured party may justly hold both the company and the servants to responsibility; but the actual wrong, so far as it is one in morals, is on the part of the servant alone, and the company is holden only through its obligation to be accountable for the action of those to whom it intrusts its business. As between the company and its servants, the latter alone is the wrong-

doer, and in calling upon him for indemnity the company basis no claim upon its own misdeeds, or default, but upon that of the servant himself.'

"By legal intendment and effect the act of the servant within the scope of his agency is the act of the master. In such case there is a legal identification of the master and servant. In the case of a railroad corporation which owes important duties to the public, or those affected by its operation, and which cannot act except through agents, there is the strongest reason for holding that with respect to acts done in its service by the agent within the scope of their employment, the corporation is present acting through its agents. *Oui facit per alium facit per se.* The servant is liable because of his own misfeasance or wrongful act in breach of his duty to use that which he controls as not to injure another. The master is liable because he acts by his servant, and is therefore bound to see that no one suffers legal injury through the servant's wrongful act done in the master's service within the scope of the agency.

"Some of the cases in discussing the liability of a servant through a third person make a distinction between non-feasance and misfeasance of the servant, but all agree that the servant is liable for his act of misfeasance. Inasmuch as the acts of the servant in this case were clearly misfeasances, no occasion arises here for noticing the distinction. Among the authorities that may be cited in support of the view that master and servant are jointly liable for the misfeasanec of the servant acting within the scope of his agency, are, Cooley on Torts, 142; Wright v. Wilcox, 19 Wend. 343; Phelps v. Wait, 30 N. Y., 76; Greenburg v. Whitcomb, 90 Wis., 225 (28 L. R. A., 439)."

In Wright v. Wilcox, 19 Wend. 343, it is said:

"In a case of strict negligence by a servant while employed in the service of his master, I see no reason why an action will not lie against both jointly. They are both guilty of the same negligence at the same time, and under the same circumstances; the servant in fact, the master constructively, by the servant, his agent. Hr. Handam lays down the rule in this way: 'Whether the principal and inferior may be charged jointly, depends on whether the inferior is liable as a trespasser *vi et armis,* or in case only. If the latter, they may be sued together, but otherwise, if the former, it being held, how justly may be questioned, that a principal is

liable for his agent's misconduct only in case.' Ham. part to actions 85. 86. This rule is in the main, doubtless right, but seems to be shaken by Moreton v. Harden, 6 Dowl. and R. 275, in respect to the quality of the servant's act. There were, in that case, three proprietors of a coach, one was driving and ran against the plaintiff's cart. All three were sued in the case; and several judges thought either trespass or case would lie against the driver, though the mischief arose from mere negligence; but all agreed that case only would lie against the other two who were absent; yet the action was maintained against all three."

In the case of Phelps v. Waite, 30 N. Y., 78, the following question, among others, was involved:

"Will a joint action lie against the principal and the agent for the negligence of the latter (in the absence of the former), in the course of his employment?" The Court, in passing upon this question, said:

"The case was retained for examination principally upon the other point—the supposed misjoinder of parties—and to enable the defendant's counsel to supply a reference to authorities showing that in analagous cases principal and agent could not be sued together. The current of authorities is certainly the other way, and in favor of the right to join these parties. And I have been unable, after a somewhat diligent examination, to find any reported case holding a contrary doctrine. The question was carefully considered by the Supreme Court in the leading case of Wright v. Wilcox (19 Wend., 343), and has since been followed in several other cases. (Montfort v. Hughes, 3 E. D. Smith's Rep., 591; Suydam v. Moore, 8 Barbour, 358; Hewett v. Swift, 10 Am. Law. Reg. 505).

"The defendant's counsel refer to a manuscript case in the Supreme Court in the Fourth Judicial District, Vernan v. Gibson & Farnham, which is supposed to hold a contrary rule; but we have not been favored with the opinion of the court, and unless it is based upon some other principal than those discussed in the cases already adverted to, it must be regarded as overborne by the weight of authority. The judgment should be affirmed."

In C., N. O. & T. P. Ry. Co. v. Cook, Admr., 67 S. W., 383, the court held that the right to sue jointly existed independently of statute, and in the course of the discussion said:

"In support of this position (that the action could not be maintained) we are referred to several cases outside this state so holding. *But the decided weight of authority is the other way.* See 15. P. & P., 560; 1 Thompson Neg., 611. The conflict in authority on the question seems to be due largely to differences of the common law forms of pleading which no longer exist in this state. Citing from Pomeroy's Remedial Rights, Sec. 307; Bliss Code Pleading, Sec. 83."

In Cook, Admr., v. Winston, 55 L. R. A., 603 (Ky.), the Kentucky Court seems to hold that a joint right of action exists independent of the Statute of that State. The Court said:

"The constitution and statutes of this state, as construed by the repeated adjudications of this court, make the railroad company liable for the acts of the agents and servants in charge of its trains. If a servant is guilty of such negligence while acting for his master, as will make the master responsible, then in such a case the servant is personally and equally responsible with the master for the damage resulting from the negligent act. The mere fact that the master may be responsible for the wrongful act of the servant does not relieve the servant from a joint liability with the master for the wrongful act which produced the injury and damage. The court then refers to the Dixon case."

The Kentucky Statute is as follows:

"Sec. 6, Ky. Statutes. Whenever the death of a person shall result from an injury inflicted by negligence or wrongful act, then in every such case damages may be recovered for such death from the person or persons, company or companies, corporation or corporations, their agents or servants, causing the same, and when the act is wilful or the negligence is gross, punitive damages may be recovered, and the action to recover such damages shall be prosecuted by the personal representative of the deceased."

In McHugh v. N. P. R. Vo., 72 Pac., 450, it was held: "In an action by an employe of a railroad for injuries received by being struck by a train while riding on a hand car, it was proper to join with the railroad as a party defendant the engineer of the train."

In Howe v. M. P. E. R. Co., 70 Pac. 100, it is held as follows: "In an action by a fireman for injuries sustained in a collision, it was proper to join with the railroad as a party defendant, the division superintendent and the division train dispatcher."

In the case of Schaefer v. Osterbrink, 67 Wis., 495, suit was brought jointly against the master and his servant to recover for personal injuries inflicted upon the plaintiff on account of the negligent driving of a team of the master by said servant past that of the plaintiff on the highway. On the question of liability the Court said:

"A duty may and often does exist without any contract. Two teams upon a public highway, each with a sleigh or vehicle, coming in close proximity to each other, the driver of each most certainly owes a duty to those riding with the other. That duty is created by law, and requires each driver to proceed with care and circumspection and with reference to the shifting situation of the other. When such driver is a servant acting within the course and scope of his employment, then such duty rests upon the master as well as the servant. Limpus v. L. G. O. Co., 32 Law J. Exch. (N. S.), 34. The employer in such case, being responsible for the performance of such duty by his delegated agency, can no more escape liability for such failure when it occurs through his agent's gross negligence or wilful misconduct, than he can when it is by reason of his agent's want of ordinary care."

In Newman v. Fowler, 37 N. J. L., 89, Mr. Chief Justice Beasley said:

"The damages for which indemnification is sought in this suit, are the results of the negligence of another party as well as that of the defendant. The plaintiff employed the defendant to oversee in the capacity of architect, the putting up of a building, and the verdict has established that this structure is defective in workmanship and material, in consequence of the want of care or want of skill, of the contractor engaged to do the work, and of the defendant as architect. The loss comprised in the present cause of action has arisen, therefore, by reason of the default of these two persons, the contractor and the defendant. The suit is against the latter solely.

"There can be no doubt that when two or more persons occasion, proximately, an injury, though not acting in concert, they are severally liable for the consequences. In this respect there is no difference between wrongs, the result of force and such as proceed

from ignorance or carelessness. Whenever the damage is the product of contributory misfeasances the action will lie against each of the wrongdoers, and the person thus sued will be held for the entire detriment. It is the familiar rule of practice that all or any of joint trespassers may be prosecuted, and that such as are thus sued must answer for all the consequences of the wrong done. Nor can they claim contribution, the one from the other, so as to dispense the loss equally among themselves, the reason being that the law will not undertake to adjust the burdens of misconduct. This principle is a general one, applicable in every case of a tort. There are many adjudications which exemplify this rule in its bearing in regard to actionable neglect. Thus, where an injury is caused by the negligence of an agent, acting in the line of his employment, the action may be joint against such agent and his principal, or may be separate against each. Phelps v. Waite, 30 N. Y., 78; Wright v. Wilcox, 19 Wend. 343. The same ground of decision was acted on recently in this Court, in the case of Bennett v. New Jersey Railroad Company, in which an action was sustained for a damage which had been caused by the negligence of the defendant and that of another party, who was not joined in the suit. It would seem, therefore, that the right of the present plaintiff to elect whether to bring this action against either of the defendants as the architect, or against the contractor, for the damage occasioned by their joint neglect is indisputable. To this extent the case presents no feature which is not common to many of those which have heretofore received judicial sanction."

TEXT WRITERS.

In Sherman & Redfield on Negligence, Vol. 1, Sec. 248 (5th Ed), it is said:

"Wherever the master can be held responsible for tortious negligence of his servant, the two are generally held jointly as well as severally liable; and if a servant employs a sub-agent under such circumstances that both original master and the intermediate employer are liable for the negligence of the sub-agent, they are all jointly and severally liable. A different rule prevails in Massachusetts and probably in Maine, a master who is not present when his servant commits a wrongful act being held not subject to joint liability even when both are severally liable."

In Cooley on Torts, 142 (1st Ed), the author said:

"The case of carriers of persons is a conspicuous instance in which the failure of a servant to observe due care may constitute a legal wrong to third parties, and render him and his master jointly liable. In undertaking to carry, the carrier assumes the duty to carry safely, so far as the highest vigilance will enable him to do so. A railroad company, acting as such carrier, employs an engineer, whose duty to the company is to run the train with skill and prudence. Now, although there are no contract relations between the engineer and the person who is to be carried, yet, when an individual is placed in a position of responsibility, and the property, and especially the persons of others, are entrusted to his prudence, his skill and fidelity, so that his negligence may inflict serious, and perhaps, irreparable injury, it is reasonable that the law should make it the right of every person thus circumstanced to demand from him a vigilance corresponding to the responsibility. And this, we understand to be the rule. The negligence in such cases is that of both master and servant, and the liability, as in other cases where two or more are chargeable with wrong, may be enforced in a suit against one or both. The *joint* liability would seem to be still plainer where the servant is guilty of a positive act of misfeasance to the property or person being carried. When a train conductor puts a man off the cars without justification, or commits an assault on a passenger in the cars, or runs his train past a station where passengers are to be left, or is guilty of any other misconduct of a like nature, the person injured is under no obligations to look beyond him for redress. Nevertheless, he may, at his option, *unite the railroad* company as a defendant, or sue it separately."

In Wood on Master and Servant (2nd Ed.), Sec. 325, it is said:

"The servant is never liable to third persons for his failure to perform his master's obligations; but for his own wrongful or negligent acts he is liable to third persons injured thereby, either alone *or jointly* with his master. Thus, if a railroad engineer negligently or wilfully runs over cattle on a track or negligently conducts his engine so that the train is thrown from the track, or runs on the time of another train so that a collision results and passengers are injured, he is liable either to the persons injured, or, if his master is compelled to respond in damages therefor, to the master for the damages."

In Estees' Pleading, Vol. 1, Sec. 1834, it is said::

"Master and servant may be joined as defendants in an action to recover for the negligence of the servant."

And in 15 Ency. Pl. & Pr., p. 560, it is said:

"Where a master or principle is liable for the tortious negligence of his servant or agent, it has been held that they may be both sued jointly in an action," citing many authorities.

SUPPOSED CONTRARY DECISIONS.

The opinion in the case of Parsons v. Winchell, 5 Cush. 592, delivered in 1850, and at a time when the common law distinctions in pleading, in that State, were still maintained, seems to furnish the basis for all subsequent decisions, in conflict with the decisions cited by us. In view of the time and circumstances under which that decision was rendered it should not be accepted as authority in cases arising in states not hampered in their decisions by any technical distinction in the forms of pleading, and especially in states, as in Tennessee, where all forms of actions have been abolished, and all redress for civil injuries may be redressed by an action on the facts of the case.

The case of Page v. Parker, 40 N. H. 47, cited by adversary counsel, is not authority for the position contended by them. The effect of that decision is that a principal cannot be jointly sued with his agent when the right of such joinder is based upon "the unauthorized fraudulent acts or representations of the servant or agent, committed or made without the knowledge and concurrence of the master or principal." Such fraudulent acts or representations were beyond the scope of his employment, and, of course, could furnish no basis for a joint action, if indeed the

principal would be liable at all. This decision was also influenced by the forms of action prevailing in that State.

In Bailey v. Bussing, 37 Conn., 349, the Court say they do not see how under the law of that State, and the practice generally, a joint action can be maintained against a master and his servant for the negligence of the servant alone. But the Court expressly refused to pass upon the question, and consequently cannot be considered as authority.

The case of Clark v. Fry, 8 Ohio St., 358, is not in point, and the quotation by adversary counsel is mere *dictum*. The case was brought by Fry against Clark, the owner of certain real estate abutting on a certain street, and Freeman who made an excavation under contract with Clark, extending into said street. The Court specifically held that the relation of master and servant did not exist between Clark and Freeman, and that the excavation was made by Freeman through his own employes, over whom Clark had no control, or direction whatever. Such decision, therefore, cannot be accepted as authority in a case where the relationship of master and servant is unquestioned. The Court said:

"Where the relation of master and servant, or that of principle and agent, exists, there is no difficulty in ascertaining the rule of liability, and the ground upon which it rests, in case of an injury done by the servant or agent in the exercise of his employment. The liability of the master to answer for the conduct of his servant, or that of the principle for the conduct of his agent, is founded on the superintendence and control which the master is supposed to exercise over his servant, or the principle of his agent. * * * * This rule of *respondeat superior*, as its terms import, arises out of the relation of superior and subordinate, is applicable to that relation wherever it exists, whether between principle or agent, or master and servant, and is coextensive with it, and ceases where the relation itself ceases to exist. It is founded on the power of control, and direction which the superior has the right to exercise, and, which, for the safety of other persons, he is bound to exercise

over the act of his subordinates, and in strict analogy to the liability *ex contractu* upon the maxim *qui facit per alium facit per se.* * * *

"Had Clark employed men to work at the building of his house under his own superintendence, control and direction, the workmen would have been bound to follow his direction in reference to every part of the work; he would have been, in fact, master of the persons under his employ, and he would have been undeniably liable for any injury which any third person might have received through the carelessness of any of the workmen in doing the work. But Clark did not so undertake to build his house. He let out by contract the building of the house to Freeman, who undertook to furnish the materials, make excavation, build the walls of the foundation, put up the building, and complete the work, replacing the plank removed from the sidewalk, etc., within a specified time, and in a specified manner, and for a stipulated compensation. There is nothing in the terms of the contract which created the relation of superior and subordinate, by placing Freeman under the superintendence and direction of Clark in the prosecution of the work. By the terms of the contract, Freeman occupied the position of a contractor, selecting and employing his own subordinates, etc., undertaking, upon his own responsibility, to conduct, direct, and control the performance of the work, in conformity with the terms of the contract. Now, in the mode and manner of conducting the work under the contract, and in the selection and employment and directing of the hands, in the performance of the work, the contract clearly does not create the relation of superior and subordinate as between Clark and Freeman, or place the latter under the power and control of the former. When a person is engaged in doing a job or piece of work under an employment or contract which does not create the relation of mere principal and agent, or master and servant, but which leaves to the contractor the free and independent use of his own skill, judgment, means and servants in the execution of it, upon what principle can the employer be made liable for any injury occasioned to a third party by reason of the negligence of the contractor or any of the subordinates? It is clearly not upon the principle of *respondeat superior.*"

The case of Bennett v. Fifield, 13 R. I., 139, was an action of Trespass on the Case, and it was sought to hold Lovell, and the Town of Warwick, as joint tort feasors. The object complained of,

was three flat cars loaded with large iron castings, which Lovell had temporarily left in the highway over which he was moving them to their place of destination. The town was charged with no act, but it was sought to hold it because of the neglect of a statutory duty. The Court said:

"The torts which are imputed to them respectively are distinct. The tort with which Lowell is charged, and for which he was sued, is a tort at common law. The tort with which the town is charged is the neglect of its statutory duty. It would be impossible to declare against them jointly if they were jointly sued, for there was no community of wrongdoing between them."

It will be seen that no question of master and servant was involved in the above case, and that Lovell was sought to be held on the ground of specific acts performed by him, while the town was sought to be held merely because it failed to comply with its statutory duties.

The case of Cole v. Lippitt, 22 R. I., 31, was one brought against Lippitt, owner of the property, Maguire and Penniman, contractors, for a part of the construction of the house, and Robertson, the architect. The deceased was employed by Maguire and Penniman. The negligence charged against Lippitt was the erection of the house upon improper plans, the negligence charged against Robertson was that he caused the erection of the house under improper plans, and the negligence charged against Maguire and Penniman was that they did not use reasonable care in the construction of the building. The Court said:

"These several charges of negligence are quite different in kind and relation, but the plaintiff claims that they constitute a joint liability, because the negligence of each defendant combine with others to produce the injury. This, however, is not enough to make a joint tort. * * * * A similar statement is made in Sellick

v. Hall, 47 Conn., 260, 274, that it is not enough to make torts joint that the acts constituting them stand in *juxta* position in time and place. *'There must be a oneness of act.'* (Italics ours.) The fact that the effects of several wrongful acts are produced at the same time and place cannot affect the question."

It will be seen that this decision was based upon the theory that in order to hold all as joint tort feasors, the cause of action must grow out of one fact, or transaction, and that you cannot blend several distinct and separate acts of the various defendants in order to hold all as joint tort feasors. This position is not antagonistic to our contention in the present case. There is no blending of several or distinct acts of the defendants, but there is "a oneness of act"—the fact of running the train in violation of statute, and so negligently as to cause the injury complained of.

The opinion in the case of Campbell v. Portland Sugar Co., 62 Me., 552, seems to be based solely upon the holding in Parsons v. Winchell, 5 Cush., 592, which decision we have heretofore shown, was influenced and governed by the forms of pleading, etc., in Massachusetts at that time. It will be observed, however, that the Court holds that both the corporation and its agent are liable, but that they cannot be jointly sued in the same action. How much this opinion may have been influenced by the practice and forms of pleading required in that state, we are unable to say.

In the case of Trowbridge v. Forepough, 14 Minn., 100, it was held that the city and its co-defendants could not be joined in the same action for the reason that under the common law they could not be so joined, and that the statutes in that state did not change the common law on the subject. The entire opinion in the case is as follows:

"The liability of the city depends on a state of facts not affecting its co-defendants; and the converse. Neither is in fact nor

in law chargeable with, or liable on account of, the matter set up as a cause of action against the other. They did not *jointly* conduce to the injury by any acts either of omission or commission.

"Under such circumstances we find no case holding that a *joint* action is maintainable; and we are of the opinion that it is unauthorized by any statute or legal principle. Our statute, which is merely declaratory of the common law, forbids the joinder of cause of action which do not effect all the parties to the action. Gen. St. c. 66, 98. For such improper joinder of causes of action any defendant may demur. There is nothing in the statute, and we discover no reason, requiring all the defendants, to join in such demurrer."

An examination of the decisions cited by counsel for railroad shows that a denial of the right of joinder is predicated upon two grounds:

1. Because of the technical question of pleading involved.

2. Because of the supposed inability to adjust the rights of the parties between themselves after a joint judgment, and that the right of recovery against the master being based upon the doctrine of *respondeat superior,* there is no way of forcing contribution in case of joint judgment.

We call the Court's attention to the fact that the rule that there can be no contribution between joint tort feasors, has no application in cases where the master is held liable for the negligence of the servant under the rule of *respondeat superior.*

Gray v. Boston Co., 114 Mass., 149.
Story on Partnership, Sec. 220.
Betts v. Gibbons, 2 Ad. & El. 57.
Wooley v. Batte, 2 C. & P., 417.
Bailey v. Bussing, 28 Conn., 455.
7 Am. & Eng. Encyl. of Law, pp. 364 and 365-366, and authorities cited.

In Gray v. Boston Co., 114 Mass., 149, the Court said:

"When two parties acting together, commit an illegal or wrongful act, the party who is held responsible in damages for the act cannot have indemnity or contributions from the other, because both are equally culpable, or *particeps criminis*, and the damage results from their joint offense. The rule does not apply when one does the act or creates the nuisance, and the other does not join therein, but is thereby exposed to liability and suffers damages. He may recover from the party whose wrongful act has thus exposed him. In such case the parties are not *in paridelicto* as to each other, though, as to third persons, either may be liable."

The text in 7 Am. & Eng. Encyl. of Law, pp. 364, 365 and 366 is as follows:

"It is a general and long-established rule that neither contribution nor indemnity will be given to one of several tort feasors against the other.

"But it is to be observed that this rule is only applied to cases of intentional and conscious wrongdoing; if the tortious act was committed without guilty intent, or if the plaintiff, without personal fault, has been exposed to liability because of his responsibility for the acts of the actual wrongdoer, he can recover contribution from those who participated in the act or shared the responsibility, or indemnity from the one with whom rests the actual guilt or the primary responsibility."

The part of the Federal Statute under which removal was had in this case provides as follows:

"And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different states and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the Circuit Court of the United States for the proper district."

It will be observed that when the removal is based upon the allegation of a separable controversy, the *whole suit* goes to the Federal

Court. If the language of the Act left any room for controversy, this question has been definitely settled by this Court.

In Barney v. Latham, 103 U. S., 205, Mr. Justice Harlan said:

"While the act of 1866 expressly confines the removal to that part of the suit which specially relates to or concerns the defendant seeking the removal, there is nothing whatever in the act of 1875 justifying the conclusion that Congress intended to leave any part of a suit in the State court where the right of removal was given to, and was exercised by, any of the parties to a separable controversy therein. Much confusion and embarrassment, as well as increase in the cost of litigation, had been found to result from the provision in the former act permitting the separation of controversies arising in a suit, removing some to the Federal Court, and leaving others in the State court for determination. It was often convenient to embrace in one suit all the controversies which was so far connected by their circumstances as to make all who sue, or are sued, proper, though not indispensable parties. Rather than split up such a suit between courts of different jurisdiction, Congress determined that the removal of the separable controversy to which the judicial power of the United States was, by the Constitution, expressly extended, should operate to transfer the whole suit to the Federal Court.

"If the clause of the act of 1875, under consideration, is not to be thus construed, it is difficult to perceive what purpose there was in dropping those portions of the act of 1866 which, *ex industria*, limited the removal, in the class of cases therein provided for, to that controversy in the suit, which is distinctively between citizens of different states, and of which there could be a final determination without the presence of the other defendants as parties in the cause."

It thus appears that if the right of the railroad to remove is based upon the theory of its supposed right to be placed in a position that it can have an adjustment with, or contribution from, its negligent servant, then such theory, in its reasoning, must fail, as all the parties are left in the same position in the Federal Court as in the State Court. The whole case is held intact and must

be tried together, and no way is provided by which an adjustment, or contribution can be had between such parties, that did not exist in the State Court. Such contention, therefore, is based upon a theory, which can have no practical operation or effect in this case.

It will be further observed that the removal Statute provides that before the right of removal exists, "there shall be a controversy which is *wholly* between citizens of different states, and which can be fully determined as between them."

This Court has in many cases construed the meaning of the above language, or rather the section in which same appears.

In Geer v. Mathieson Alkali Works, 190 U. S., 428, 432, Mr Justice McKenna said:

"A suit may, consistently with the rules of pleading, embrace several distinct controversies. Barney v. Latham, 103 U. S. 205, 212. It was said in Hyde v. Ruble, 104 U. S. 409: 'To entitle a party to a removal under this clause (second clause of section 2 of the act of 1875, same as second clause in the act of 1877), there must exist in the suit a separate and distinct cause of action, in respect to which all the necessary parties on one side are citizens of different states from those on the other.' In other words, as expressed in Fraser v. Jennison, 106 U. S., 191, 194, 'the case must be one capable of separation into parts, so that, in one of the parts, a controversy will be presented with citizens of one or more States on one side, and citizens of other States on the other, which can be fully determined without the presence of any of the other parties to the suit as it has been begun.' And when two or more causes of action are united in one suit there can be a removal of the whole suit on the petition of one or more of the plaintiffs or defendants (now only the defendants) interested in the controversy, which if it had been sued on alone would be removable. Hyde v. Ruble, *supra*. See also Ayres v. Wiswall, 112 U. S. 187 The application of these principles to the case at bar will be seen by the relief prayed for."

There must exist, therefore, as shown by the pleading, two or more *district controversies,* or "there must exist in the suit a *separate and distinct cause* of action," or the case must be one capable of *separation into parts,"* etc.

In the present case *there is but one controversy, and such controversy grows out of the same transaction, the one fact—the negligent and wrongful operation of the master's train* through which injury resulted, etc.

There is but one cause of action stated, and this cause of action is incapable of being separated into parts.

The theory or grounds upon which liability is placed against each party can make no difference—*the question is, does the liability of all grow out of the same transaction, the same controversy.*

Again, there is no relief sought against the railroad that is distinct, or separable from that sought against its servants. There is no wilfulness or wantonness charged against the servants, entitling the recovery of punitive or exemplary damages, and consequently the relief sought against all is merely for compensatory damages.

Except as to the Warax case, adversary counsel seem content to rely upon a bare citation of other subordinate Federal cases. But we desire to notice some of the cases cited for the purpose of showing they have no application to the facts certified in this case.

The cases of Bryce v. Southern Ry. Co., 122 Fed. Rep., 709, Davenport v. Southern Ry. Co., 124 Fed. Rep., 983, Bryce v. Southern Ry. Co., 125 Fed. Rep., 958, Gustafson v. Chicago, R. I. & P. Ry. Co., 128 Fed. Rep. 87, and McIntyre v. Southern Ry. Co., 131 Fed. Rep., 985, when rightly understood throw no light upon the controversy in this case.

In Bryce v. So. Ry. Co., 122 Fed. Rep. 709, the Court held that a separable controversy existed because under the Code Civ. Proc. of S. C., where the case originated, the plaintiff must set out in his complaint a plain and concise statement of the facts constituting his cause of action, and it was found as *a fact* that this provision of the Code had not been complied with as to the engineer and conductor, sued jointly with the railroad company, and that the complaint was, therefore, insufficient under the provisions of said Code to state a cause of action against said engineer and conductor, and that a cause of action having been stated only against the railroad, it was entitled to remove the cause.

No such case is presented in the present controversy.

In Davenport v. Ry. Co., 124 Fed. Rep. 983, the action was against the railroad company and certain of its employes to recover for the death of a person, which was alleged to have been caused through the wanton, wilful, reckless and malicious acts of said employes. There was no allegation that the company participated in such acts. The Court on this state of facts held that a separable controversy existed on the theory that in such case the company would only be liable for compensatory damages, while the servants would be liable for punitive or vindicative damages, and that consequently the remedy is different against them, and requiring a different judgment.

In Gustafson v. Chicago, R. I. & P. Ry. Co., 128 Fed. Rep. 87, the identical question was involved as in the Davenport and McIntyre cases above referred to, as will fully appear from an excerpt from the opinion of Judge Philips (page 96): "By the use of the accumulated epethets that this was done 'carelessly, negligently and recklessly,' the term 'recklessly' thus employed is tantamount

to the allegation that it was 'a wanton disregard of all consequences,' and would warrant the jury in awarding punitive damages against the defendant Hanna, Times Publishing Company v. Carlisle, 94 Fed. 773, 36 C. C. A. 475. Such an allegation in the petition, without more, would warrant the Court in instructing the jury that the plaintiff, if the allegation be sustained by the evidence, would be entitled to exemplary damages as against the defendant Hanna; and this fact, manifest on the face of the petition, presents a separable controversy as to the defendant company under the removal act," citing in support of such holding Davenport v. Southern Ry. Co., 124 Fed. 983.

In the case of McIntyre v. Southern Ry. Co., 131 Fed. Rep. 985, the employes sued with the railroad company were charged with wilfully, wantonly and maliciously causing the injury complained of, and the District Judge followed the decision of Judge Simonton in Davenport v. So. Ry. Co., 124 Fed. Rep. 983.

All the above cases, except Bryce v. So. Ry. Co., 122 Fed. 709, are decided upon the same theory, to-wit., that the charge of wilfulness, wantonness, etc., on the part of the employes created a separable controversy. The District Judge in the McIntyre case said: "The wanton, wilful and malicious acts of the servants charged in the complaint give a separate cause of action against them, and damages may be assessed to the party injured, upon principles altogether different to those allowable against the company itself, for the party may recover punitive damages upon such a cause of action, while the company, although liable in damages for the negligence of its servants, is only liable for compensatory damages, unless it, by its conduct, expressly or impliedly, authorized or approved the wrongful act which the complaint herein nega-

tives." Whether a separable controversy can in any case be predicated upon such a theory is, at least, open to very grave doubt. But be that as it may, no such case is presented here.

In the present case no question of wilfulness, wantonness, maliciousness or recklessness on the part of the servants is involved, and consequently a case decided solely on the theory aforesaid, cannot have any bearing on the present controversy. It will be observed that Judge Simonton delivered the opinions in three of the foregoing cases.

And attention is also called to the fact that, in Davenport v. So. Ry. Co., 135 Fed. Rep. 960, the Circuit Court of Appeals of the Fourth Circuit expressly overruled the case of Davenport v. So. Ry. Co., 124 Fed. Rep. 983, and remanded the cause to the State court. Consequently, the decisions predicated upon such erroneous holding cannot be relied upon as authority.

The much quoted case of Helms v. Northern Pac. Ry. Co., 120 Fed. Rep., 389, was a co-employe case, and Judge Amidon rested his decision on the fact that the deceased being a fellow servant of the engineer and the other servants in charge of the engine whose negligence caused the injury, the railroad would not be liable under the common law for such injury, and that the liability of the company must be predicated upon the Statute of Minnesota, doing away with the fellow servant rule in certain cases, while the liability against the servant is based upon the common law. From this Judge Amidon concludes there is a separable controversy. This decision having been influenced by Statute, everything else said by the Judge, as to what the rule independent of Statute is, was mere *dictum.*

In the present case the right of action against all the defendants must rest upon the same foundation, and upon the same facts.

Enough has appeared, from an analysis of the foregoing cases, to show the inapplicability of most of the cases cited by adversary counsel, to the facts certified in this case.

III.

The right of joinder and the question of separable controversy being so intimately associated, the two questions being generally discussed together in the authorities, we have thought it unnecessary in discussing the questions involved in this controversy to separate the two subjects, and cite the authorities separately sustaining the two propositions, and we rely upon the authorities cited by us as sustaining not only the right of joinder, but also as showing that there exists no separable controversy entitling the railroad company to remove the cause.

Counsel for railroad argue extensively to show that no liability whatever is shown against the individual defendants in this case, and that consequently there can be no joint liability. If this question is presented by the certificate at all, it is only indirectly and because of the legal conclusion that must be drawn from the fact of non-liability on the part of the individual defendants, if the fact be so found.

At a former day of the same term at which this certificate was made, the same Court and consisting of the same Judges, *held* that the negligent acts of an individual defendant, under similar circumstances to those in the present case, constituted actionable negligence against him, and that no separate controversy existed.

American Bridge Co. v. Hunt, 130 Fed. Rep., 302.

From this, as well as from the certificate, it will appear that the Court was not troubled as to whether the individuals were liable at all, but "entertaining grave doubts as to whether a joint right of action was stated against the railroad company and the two individual defendants who were servants of the railroad," instructions are asked, etc., as to whether the parties can "be jointly sued," etc.

That the individual defendants in this case are liable, there can be but little, if any, doubt. The authorities cited by us show liability on the part of the servant beyond question.

Counsel on page 31 of their brief say:

"One of the tests by which to determine whether parties may be sued on a joint tort is whether the same proof would make a case against each. That test fails where the master's liability depends only upon his relation of master; because, to hold the servant liable, it would be necessary only to prove the doing of the act; but in order to make the master liable, it is necessary to prove, in addition, the agency of the servant and that the injurious act was within its scope."

We submit that the true test is not *"whether the same proof would make a case against each."* It is perfectly apparent that in many cases where the right to sue jointly has been maintained, more proof may be required to make the case against some of the defendants than against the others. The mere difference in the *quantum* of proof required has never been held to present a question of the right of joinder, or of separable controversy. The real question in all such cases is whether all the defendants are liable for the acts of wrongdoing or negligence complained of.

The liability of all the defendants in this case arise from the same identical facts, the negligent transaction of the master's busi-

ness. There is but one tort springing from the same set of facts, and there can be but one satisfaction. On principle, and in the very nature of the case, it is most fitting and proper that the action should be joint. In its very nature a tort is a unity. There is but one injury to be redressed, and it makes no difference how complicated the circumstances, nor how numerous the parties may be, nor how varied the relations of the parties, all converge in the one fact of the tort and all parties contributing thereto must answer jointly. It is not necessary that all shall actually participate as *tort feasors* in order to create a joint liability. But the doctrine of joint liability should rest upon the legal right to sue all upon the same facts and for the identical wrong. The question is not one merely of personal wrongdoing, but of legal responsibility for the wrong committed.

When the fact is considered that a corporation must of necessity act through the instrumentality of its agents and servants, and that it alone has the authority to employ such agents and servants, and that third persons have no voice in such selection, then it would seem but reasonable and just that for the negligent and wrongful act of such agent or servant, resulting in injury to a third person, the corporation should not be permitted to so disconnect itself from such agent or servant as to prevent a joinder of both in the same action. The third party is in no way to blame. When a corporation is organized, it is bound to be known that it can only act through its agents and servants, and why should not such corporation, by such act of incorporation and the subsequent employment of agents and servants to transact its business, be held to have so connected and identified itself with such agents and servants that it must answer jointly for the negligence of such agent or servant. Corporations, such as railroads, do not conduct their

business as charitable institutions, but for money-making purposes, and no good reason can be given why they should not be held to strict accountability for the negligence of those whom they employ.

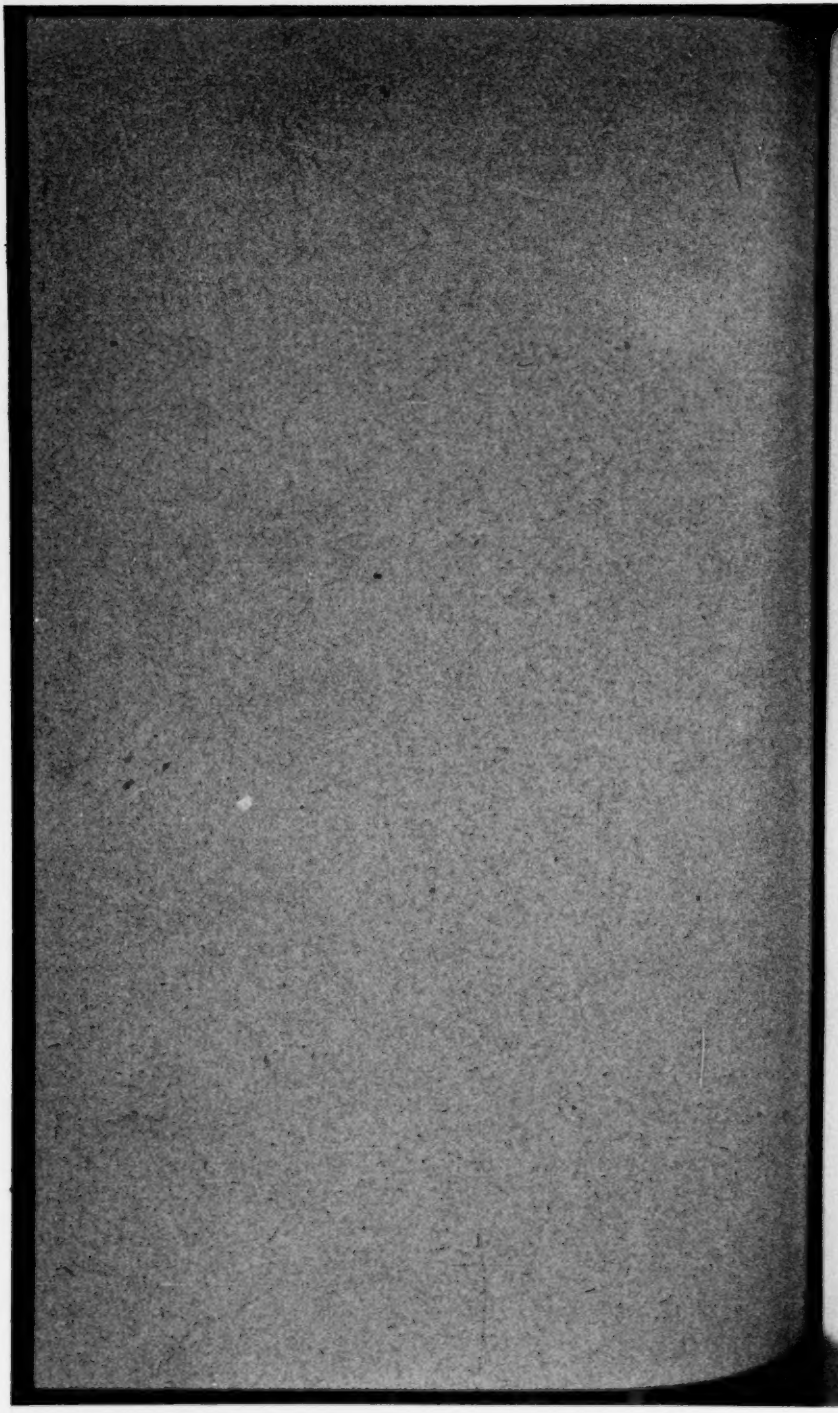
Every foreign railroad company that does business within the limits of a certain state, does so by virtue of the rights, franchises, and privileges granted by such state, and the citizens thereof should have the right to redress any grievance they may have against such corporation in the tribunals of the state, wherein such corporation has, by permission entered, and become subject to its laws. Such aggrieved party should not be put to the inconvenience and expense of taking his witnesses into another jurisdiction, which may be far removed from the place of the wrong committed, such removal being based upon the mere technical question of the supposed right of the railroad to have an adjustment, as between itself and its own negligent servant, as to any liability incurred through the acts of such servant. To establish such rule would not only in many cases work great hardship and inconvenience to the injured party, but might operate as an absolute denial of justice, because of the inability of such party to meet the requirements necessarily devolving upon him under such rule.

We think Question No. 1 should be answered in the affirmative and Question No. 2 in the negative.

Respectfully submitted,

E. S. DANIELS,
J. V. WILLIAMS,
Attorneys for Administrator.

JOHN O. BENSON,
of Counsel.



Supreme Court of the United States.

No. 58.—October Term, 1905.

Alabama Great Southern Railway Company vs. H. C. Thompson, Administrator of Florence James, Deceased.	On a certificate from the United States Circuit Court of Appeals for the Sixth Circuit.

[January 2, 1906.]

Mr. Justice Day delivered the opinion of the Court.

This case is here on a certificate from the United States Circuit Court of Appeals for the Sixth Circuit. The certificate states the facts and propounds the questions as follows:

"This was an action in tort brought by the administrator of Florence James for the negligent killing of the intestate by the defendant railroad company.

"The suit was started in a Circuit Court of the State of Tennessee and a declaration was there filed.

"The plaintiff was a citizen of Tennessee.

"The defendants were The Alabama Great Southern Railway Company, a corporation organized under the laws of Alabama, and William H. Mills and Edgar Fuller, both citizens of the State of Tennessee.

"The case was then removed into the court below upon petition of the railroad company alone, upon the ground that a separable controversy, involving more than $2,000, exclusive of interest and costs, existed between the petitioner and the plaintiff, as to whom diversity of citizenship existed, which could be tried out without the presence of either of the individual co-defendants of petitioner.

"A motion to remand to the State court because no removable separable controversy appeared was overruled.

"Thereupon an issue was made and the case heard by court and jury, and a judgment rendered in favor of the plaintiff and against the railroad company alone.

"From this judgment the railroad company sued out this writ of error.

"Upon the hearing in this court the court raised the question as to whether the court below had rightfully acquired jurisdiction by the removal proceedings referred to, the removal being grounded only upon the question of separable controversy appearing upon the face of the declaration of the plaintiff at the time of the application for removal.

"That declaration substantially averred that the intestate of the plaintiff had been negligently, wrongfully and carelessly run over while upon the track of the railroad company, in the exercise of due care, by an engine and train of cars owned and operated by the railroad company, which said train was at the time under the management and control of the individual defendants, William H. Mills, as conductor, and Edgar Fuller, as engineer.

"Entertaining grave doubt as to whether a joint right of action was stated against the railroad company and the two individual defendants, who were servants of the railroad company, it is ordered that the foregoing statement be certified to the Supreme Court, and that the instruction of that court be requested for the proper decision of the following questions which arise upon the record:

"1. May a railroad corporation be jointly sued with two of its servants, one the conductor and the other the engineer of one of its trains, when it is sought to make the corporation liable only by reason of the negligent act of its said conductor and engineer in the operation of a train under their management and control, and solely upon the ground of the responsibility of a principal for the act of his servant, though not personally present or directing and not charged with any concurrent act of negligence?

"2. Is such a suit removable by the corporation, as a separable controversy, when the amount involved exceeds $2,000, exclusive of interest and costs, and the requisite diversity of citizenship exists between the said company and the plaintiff, the citizenship of the individual defendants sued with the company as joint tort-feasors being identical with that of the plaintiff?"

A question certified must be one the answer to which is to aid the court in determining a case before it. (*Columbus Watch Co.* v. *Robbins*, 148 U. S. 266.) And it is evident that the matter to be determined in the case pending, desiring which the opinion of this court is asked, is the removability of the case brought in the State court against the railroad company and the individual defendants. We shall answer the questions in that view.

The right to remove the controversy is founded upon section two of the act of March 3, 1887, as corrected August 13, 1888, (1 Suppl. Rev. Stat. U. S. 611.) It is therein provided, among other things, "And when in any suit mentioned in this section there shall be a controversy which is wholly between the citizens of different States, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the Circuit Court of the United States for the proper district."

The case was removed upon the theory that it contains a separable controversy between the non-resident railroad company and the plaintiff. The removal act of 1875, as amended in 1887–88, in the part quoted above as to separable controversies, has been the subject of frequent adjudication in this court. Independent of statute, there is much conflict in the authorities as to whether a corporation, whose liability does not arise from an act of concurrence or direction on its part, but solely as a result of the relation of master and servant, may be jointly sued with the servant whose negligent conduct directly caused the injury. In a leading case in this court (*Chesapeake & Ohio R. R. Co.* v. *Dixon*, 179 U. S. 131,) many of the cases were reviewed by the Chief Justice who delivered the opinion, and it was

shown that in a number of English and American cases it has been held that, as to third persons, the master is responsible for the negligence of his servant in a joint action against both, to recover damages for an injury. In the cases of *Warax* v. *Cincinnati, N. O. & T. P. Railroad Co.*, (72 Fed. Rep. 637,) a case which has been much cited and sometimes followed in the Federal courts, it was held that a joint action could not be sustained against master and servant for acts done without the master's concurrence or direction, when his responsibility arises wholly from the policy of the law, which requires that he shall be held liable for the acts of those he employs in the prosecution of his business. And it was held that the petition against the engineer and the company presented a case of misjoinder, and could be removed on the application of the non-resident company.

In the case of *Powers* v. *Chesapeake & Ohio R. R. Co.*, (169 U. S. 92,) suit was brought against a railroad company and several of its servants for an injury alleged to have been caused by the joint negligence of all. Mr. Justice Gray, delivering the opinion of the court, said:

"It is well settled that an action of tort, which might have been brought against many persons or against any one or more of them, and which is brought in the State court against all jointly, contains no separate controversy which will authorize its removal by some of the defendants into the Circuit Court of the United States, even if they file separate answers and set up different defenses from the other defendants, and allege that they are not jointly liable with them, and that their own controversy with the plaintiff is a separate one; for, as this court has often said, 'A defendant has no right to say that an action shall be several which the plaintiff seeks to make joint.' A separate defense may defeat a joint recovery, but it cannot deprive a plaintiff of his right to prosecute his suit to final decision in his own way. The cause of action is the subject-matter of the controversy, and that is, for all the purposes of the suit, whatever the plaintiff declares it to be in his pleadings. (*Pirie* v. *Tvedt*, 115 U. S. 41, 43; *Sloane* v. *Anderson*, 117 U. S. 275; *Little* v. *Giles*, 118 U. S. 596, 600, 601; *Louisville & Nashville R. R. Co.* v. *Wangelin*, 132 U. S. 599; *Torrence* v. *Shedd*, 144 U. S. 527, 530; *Connell* v. *Smiley*, 156 U. S. 335, 340.)"

After thus stating the rule, the justice commented on the Warax case, *supra*, as a departure from the former ruling of the Circuit Court. And while the Powers case was decided on the ground of the right to remove after the local defendants had been dismissed from the action by the plaintiff, it is patent from the language just quoted from the opinion that, conceding the misjoinder of causes of action appeared on the face of the petition, that fact was not decisive of the right of the non-resident defendant to remove the action to the Federal court.

And in *Louisville & Nashville R. R. Co.* v. *Wangelin*, (132 U. S. 596–600,) the same eminent judge, speaking for the court, said:

"It has often been decided that an action brought in a State court against two jointly for a tort cannot be removed by either of them into

the Circuit Court of the United States, under the act of March 3, 1875, c. 137, sec. 2, upon the ground of a separable controversy between the plaintiff and himself, although the defendants have pleaded severally, and the plaintiff might have brought the action against either alone. (18 Stat. 471; *Pirie* v. *Tvedt*, 115 U. S. 41; *Sloane* v. *Anderson*, 117 U. S. 275; *Plymouth Company* v. *Amador & Sacramento Co.*, 118 U. S. 264; *Thorn Wire Hedge Co.* v. *Fuller*, 122 U. S. 535.)

"It is equally well settled that in any case the question whether there is a separable controversy which will warrant a removal is to be determined by the condition of the record in the State court at the time of the filing of the petition for removal, independently of the allegations in that petition or in the affidavit of the petitioner, unless the petitioner both alleges and proves that the defendants were wrongfully made joint defendants for the purpose of preventing a removal into the Federal court."

The language quoted by Mr. Justice Gray in the Powers case was used by Chief Justice Waite in delivering the opinion of the court in *Louisville & Nashville Railroad Company* v. *Ide*, (114 U. S. 52.) The Chief Justice said: "A defendant has no right to say that an action shall be several which a plaintiff elects to make joint. (*Smith* v. *Rines*, 2 Sumner, 348.) A separate defense may defeat a joint recovery, but it cannot deprive a plaintiff of his right to prosecute his own suit to final determination in his own way." It is true, as suggested by counsel, that Mr. Justice Gray used the word "seeks" instead of "elects;" but we do not perceive that this change deprives the doctrine announced of its force and effect.

The language is used of an action begun in the State court, and it is recognized that the plaintiff may select his own manner of bringing his action and must stand or fall by his election. If he has improperly joined causes of action he may fail in his suit; the question may be raised by answer and the right of the defendant adjudicated. But the question of removability depends upon the state of the pleadings and the record at the time of the application for removal, (*Wilson* v. *Oswego Township*, 151 U. S. 56, 66,) and it has been too frequently decided to be now questioned that the plaintiff may elect his own method of attack, and the case which he makes in his declaration, bill or complaint, that being the only pleading in the case, is to determine the separable character of the controversy for the purpose of deciding the right of removal. (*Louisville & Nashville Railroad Co.* v. *Ide*, 114 U. S. 52; *Graves* v. *Corbin*, 132 U. S. 571; *Little* v. *Giles*, 118 U. S. 516; *East Tennessee, V. & G. R. R.* v. *Grayson*, 119 U. S. 240; *Torrence* v. *Shedd*, 144 U. S. 527; *Chesapeake & Ohio R. R.* v. *Dixon*, 179 U. S. 131; *Southern Ry.* v. *Dixon*, 194 U. S. 136.)

In *Whitcomb* v. *Smithson*, (175 U. S. 635,) an action was brought by Smithson in a State court of Minnesota against the Chicago Great Western Railway Company and Whitcomb and Morris, receivers of the Wisconsin Central Company, to recover for personal injuries while serving the

Chicago Great Western Railway Company as a fireman, as the result of a collision between the locomotive upon which he was at work and one operated by the receivers, who were officers of the Federal court. The railway company answered, and the receivers filed a petition for removal to the United States Circuit Court. The case was thereafter remanded by the Federal court, that court holding there was no separable controversy and that the joinder was in good faith. Upon the trial in the State court a verdict was directed by the court in favor of the railway company. Thereupon the receivers asked permission to file a supplemental petition for removal, and upon proffer of a petition and bond the application was denied, and a verdict was returned against the receivers only. Of this feature of the case the Chief Justice, delivering the opinion of the court, said:

"The contention here is that when the trial court determined to direct a verdict in favor of the Chicago Great Western Railway Company, the result was that the case stood as if the receivers had been sole defendants, and that they acquired a right of removal which was not concluded by the previous action of the Circuit Court. This might have been so if, when the cause was called for trial in the State court, plaintiff had discontinued his action against the railway company and thereby elected to prosecute it against the receivers solely, instead of prosecuting it on the joint cause of action set up in the complaint against all the defendants. (*Powers* v. *Chesapeake & Ohio Railway*, 169 U. S. 92.) But that is not the case. The joint liability was insisted on here to the close of the trial, and the non-liability of the railway company was ruled *in invitum*."

In other words, the right to remove depended upon the case made in the complaint against both defendants jointly, and that right in the absence of a showing of fraudulent joinder, did not arise from the failure of the complainant to establish a joint cause of action.

The fact that by answer the defendant may show that the liability is several cannot change the character of the case made by the plaintiff in his pleading so as to affect the right of removal. It is to be remembered that we are not now dealing with joinders, which are shown by the petition for removal, or otherwise, to be attempts to sue in the State courts with a view to defeat Federal jurisdiction. In such cases entirely different questions arise, and the Federal courts may and should take such action as will defeat attempts to wrongfully deprive parties entitled to sue in the Federal courts of the protection of their rights in those tribunals.

In the present case there is nothing in the questions propounded which suggests an attempt to commit a fraud upon the jurisdiction of the Federal courts.

As shown in the opinion of the Chief Justice in the Dixon case, *supra*, the cases are in difference as to whether a common law action can be sustained against master and servant jointly because of the responsibility

of the master for the acts of the servant in prosecuting the master's business. In good faith, so far as appears in the record, the plaintiff sought the determination of his rights in the State court by the filing of a declaration in which he alleged a joint cause of action.

Does this become a separable controversy within the meaning of the act of Congress because the plaintiff has misconceived his cause of action and had no right to prosecute the defendants jointly? We think in the light of the adjudications above cited from this court, it does not. Upon the face of the complaint, the only pleading filed in the case, the action is joint. It may be that the State court will hold it not to be so. It may be, which we are not called upon to decide now, that this court would so determine if the matter shall be presented in a case of which it has jurisdiction. But this does not change the character of the action which the plaintiff has seen fit to bring, nor change an alleged joint cause of action into a separable controversy for the purpose of removal. The case cannot be removed unless it is one which presents a separable controversy wholly between citizens of different States. In determining this question the law looks to the case made in the pleadings, and determines whether the State court shall be required to surrender its jurisdiction to the Federal court.

As early as 1816 this court, in determining a question of jurisdiction, was governed by the character of the suit brought by the plaintiff. In *New Orleans* v. *Winter*, (1 Wheat. 91,) it was held that a citizen of a Territory could not sue in a Federal court by joining with himself a citizen of another State. The opinion was delivered by Chief Justice Marshall, who said (p. 95): "In this case it has been doubted whether the parties might elect to sue jointly or severally. However this may be, having elected to sue jointly, the court is incapable of distinguishing this case, so far as respects jurisdiction, from one in which they were compelled to unite."

It is urged with much earnestness by the learned counsel for the company that this view works a surrender of the right of determination of Federal rights in the Federal courts, and deprives non-resident citizens of their rights to appeal to those tribunals. The decision of a State court, that such actions as the present might be joint, at common law would have no controlling effect in the Federal courts in determining the question in causes properly before them. And the question here is not what is the rule of the Federal courts in similar cases, but is, what controversies has Congress made removable in the act under considera tion? Congress has not said, whatever it might do, that controversies between citizens of different States shall be removable wherein it is sought, contrary to the law as administered in the Federal courts, to hold the citizen of another State to joint liability in tort with a citizen of the State where the action is brought. The fact that the State court may take a different view from the courts of

the United States of the common law as to the character of such actions, and the right to prosecute them in form joint as well as several, affords no ground of removal.

The Federal courts in some States hold a different rule as to the doctrine of fellow-servants from that administered in the State courts, and in other ways administer the common law according to their own views. It has not been suggested that a right of removal should arise from such differences. No more has Congress given the right where the State permits an action to be prosecuted jointly which would be held to be several only in the courts of the United States. The applicant for removal has been duly summoned into a cause in course of prosecution in the State court. All of the defendants not being non-residents it can remove only if it presents a separable controversy, which can be wholly determined between itself and the plaintiff. The test of such controversy, as this court has frequently said, is the cause of action stated in the complaint. That is joint in character, and there is no attack upon the good faith of the action. In such case we hold that no separable controversy is presented within the meaning of the act of Congress.

We answer the first question: That for the purpose of determining the right of removal the cause of action must be deemed to be joint. The views herein expressed lead to an answer to the second question in the negative.

In this opinion we have taken no account of the peculiar statute of Tennessee as to the liability of railroads for injuries to persons on the tracks, as its effect is not presented in the questions propounded, nor is it stated that the injury was received in the State of Tennessee.

True copy.

Test:

Clerk Supreme Court, U. S.